Nos. 11839 and 12082

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

TOM C. CLARK, Attorney General of the United States, and WILLIAM E. CARMICHAEL, District Director, Immigration and Naturalization Service, United States Department of Justice, District 16,

Appellants,

vs.

ALBERT YUICHI INOUYE, MIYE MAE MURAKAMI, TSUTAKO SUMI and MUTSU SHIMIZU,

Appellees.

GEORGE C. MARSHALL, as Secretary of State,

Appellant,

vs.

MIYE MAE MURAKAMI, TSUTAKO SUMI and MUTSU SHIMIZU,

Appellees.

BRIEF FOR APPELLEES.

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BRIEF FOR APPELLEES.

Decisions Below.

The judgment of both courts below held the renunciations of appellees, pursuant to 8 U. S. C. 801 (i) invalid [R. 369, M. R. 53].[1] Both courts made detailed Findings of Fact [R. 341, M. R. 30] and included therein express findings that the renunciations by appellees were not volun-

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[1]The same designations to the records as followed by appellants (B. 1, note 1) will be used here. That is, to No. 11839 by the symbol "R" and to No. 12082 by the symbol "M. R."

tary or of their own free will [R. 366, 367; M. R. 50]. In addition, in case No. 11839, the Court concluded that as a matter of law appellee Inouye, being under the age of 21, was under a legal disability to renounce [R. 367]. The opinion in No. 11839 is reported at 73 Fed. Supp. 1000. No opinion was written in No. 12802.

Jurisdiction.

This Court has jurisdiction under new Title 28 U. S. C. Section 1291.

Statement of Facts.

The appellees were born in the United States and thus held United States citizenship as native-born Americans. They have at no time committed, been charged with, or even been suspected of, any crime or offense against the United States, nor of any disloyal or detrimental act to the United States. They are, however, of Japanese ancestry. They here seek a re-affirmation of their citizenship which, according to appellants, they irrevocably lost in the renunciation of citizenship program, which was the culminating step in the war-time series of racial measures and restraints imposed on West Coast citizens of Japanese ancestry [R. 1-15; M. R. 2-15].

1. BACKGROUND OF RENUNCIATION.

(a) Commencement of Program Against Citizens of Japanese Ancestry.

For more than three months after the outbreak of the war, security on the West Coast was safeguarded without racist measures; while a large number of aliens of Japanese ancestry were interned, these internments were effected under the general program affecting aliens of enemy na-

tionality.[2] But about the middle of January, 1942, expulsion from the West Coast of all persons of Japanese ancestry—a measure which had been periodically advocated as a means of eliminating economic competition from this minority—was again urged by a number of West Coast propagandists, organizations, and political figures; and a campaign was commenced for the expulsion of all persons of this ethnic group, regardless of American citizenship or individual loyalty.[3] In February, General J. L. DeWitt, West Coast commander, formulated and recommended to the War Department a plan for such mass racial expulsion; and on February 19, 1942, the Executive Order under which the expulsion and other orders against persons of Japanese ancestry were thereafter issued, was promulgated. General DeWitt subsequently explained

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[2]H. R. Rep. No. 2124, Interior Report of Committee Investigating National Defense Migration, 77th Congress, 2d Sess. (1942), 27-28, 157-160; T. & N. 4-5.

As in appellants' brief, authoritative documents setting forth facts of general knowledge will be cited herein, and may be judicially noticed by this Court under well-established doctrine. See *Hirabayashi v. United States,* 320 U. S. 81, 102. By virtue of this doctrine the study made under the auspices of the University of California by Thomas and Hishimoto entitled "The Spoilage," could be relied upon herein, even aside from its incorporation in the record. Compare Appellants' Brief (hereinafter abbreviated App. Br.) note 6. "The Spoilage" will, following appellants' practice, be referred to as "T & N."

[3]T & N, 17-19; House Report, cited *supra* note 2, 139-156. In Hawaii, where there was no history of economic competition and expulsion attempts, there was no agitation for mass expulsion nor were any special restraints imposed on persons of Japanese ancestry, though they there constituted thirty-seven per cent of the total population as compared to less than two per cent on the West Coast. See 16th Census of the United States, Population, 2d Series, for California, p. 10; for Oregon, p. 10; for Washington, p. 10; for Hawaii, p. 21, House of Representatives Report No. 2124, 77th Cong., 2d Sess. (1942) 92, 96; McWilliams, *Prejudice* (1944) 141-146.

and justified the mass racial expulsion on the basis that all persons of Japanese descent were "subversive" members of "an enemy race" whose "racial strains are undiluted," that they constituted "over 112,000 potential enemies . . . at large today along the Pacific Coast" and that there was "no ground for assuming any Japanese . . . will not turn against this nation."[4] General DeWitt thus ignored American citizenship, clearance by the F. B. I. and the other investigative agencies which had studied this group, individual demonstrations of loyalty to this country and opposition to Japanese imperialism, and the war-time record of these people both before and after the expulsion.[5] But it was not General DeWitt's racist view that determined the final extent and outcome

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[4]Final Report, Japanese Evacuation from the West Coast, 1942, submitted by Lt. Gen. J. L. DeWitt to the Chief of Staff, dated June 5, 1943 (hereinafter termed Final Report), Preface.

[5]Investigative reports had been compiled over a period of years as to the West Coast population of Japanese ancestry and showed that there was no reason to suspect that the great majority of the 70,000 native-born American citizens were in any way potentially dangerous. See Ringle, The Japanese in America, Harper's Magazine, October 1942, 489 (see p. 564 with respect to the author's function, as a Naval Intelligence officer, to study the West Coast Japanese); McWilliams, *Prejudice* (1942) 114-115.

General DeWitt noted in his report that no act of sabotage had in fact been committed prior to the expulsion, but he did not permit this evidence to shake his assumption of danger, stating that the very fact that no sabotage had been committed was disturbing evidence that it would be (Final Report, at p. 34). It may be observed that in fact the record of no sabotage by resident persons of Japanese ancestry continued not only during the eight months after Pearl Harbor during which the expulsion was gradually undertaken, but during the rest of the war [R. 112], nor was any resident person of Japanese ancestry found to be engaged in espionage during the entire period, nor was there ever any serious attempt by any of the evacuees to escape from the detention camps [R. 221]. Further it is to be observed that the principal defendants charged with espionage in pre-Pearl Harbor cases were Caucasians. See Annual Report of the Attorney General (1937) 76; McWilliams, cited *supra,* at 110-111.

of the expulsion; rather the determinant was the racial hostility of Caucasian residents of the interior. The original program merely to expel persons of Japanese ancestry from a coastal strip and allow them to resettle in the interior of California and in other states, was changed to one of expulsion from the whole of the State of California, and detention in detention camps; this change was made because the residents of the interior states expressed strong antagonism to resettlement in their states, due in large part to their unwillingness to accept the Coast's "undesirables," and as well as to fear of economic competition from the resettlers.[6] Because of this attitude General DeWitt inaugurated detention so as to prevent "any untoward incident" and to make the evacuation more "orderly."[7] Detention thus was imposed because of the situation arising from the evacuation, rather than because of the character of the evacuated population; this phenomenon, of each step in the program against persons of Japanese ancestry engendering consequences and conditions which in turn were largely responsible for the next step, was typical of ensuing phases of the program as well [see R. 296].

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[6]T & N, 7-13, 24-25.

[7]See contemporaneous statement of General DeWitt's Assistant Chief of Staff, Civil Affairs Division, who recommended detention, in House of Representatives Report No. 1911, Preliminary Report of Committee Investigating National Defense Migration, 77th Cong., 2d Sess. (1942) 6, 8. And see to the same effect *Ex parte Endo,* 323 U. S. 283, 295-296, quoting General DeWitt's Report.

That the expelled persons would not in any event have forced themselves into hostile communities is indicated by the fact that all of an initial group which was expelled and given the option of going to an Army shelter or interior locations of their own choice, went to the shelter. See Final Report, at pp. 107, 109, 49, 363.

(b) Mechanics of Evacuation and Detention.

The evacuation and detention were effected by a series of orders by General DeWitt, each one notifying all persons of Japanese ancestry in a designated locality to report for evacuation six days subsequent to the issuance of the order, and stating that they could take with them from their homes only a minimum of personal possessions. They were not notified whether the evacuation was permanent or temporary, or what would follow their reporting for evacuation, either immediately or ultimately. Employment connections were severed, property was sold at great sacrifice, and business and other enterprises representing life-time's of labor virtually wiped out [T & N 13-17; see Final Report, at pp. 55-64]. When persons of Japanese ancestry reported for evacuation, they found themselves transported under military guard to crude so-called "Assembly Centers," which were mainly hastily converted race-tracks. There they remained, under armed guard, with continued indiscriminate en masse treatment as prisoners, for periods ranging up to six months [T & N 13-14, 22-23; Final Report, c.X; House Report cited, *supra,* note 2, at p. 40]. From these Centers they were removed to War Relocation Authority detention centers, which while somewhat less crude, were likewise extremely crowded and uncomfortable with inadequate recreational, occupational, and other facilities [T & N 26-33].

The appellees in No. 12082 were in the WRA center known as the Tule Lake segregation center at the time of the renunciation program. This center was established in the following manner:

(c) Segregation.

Largely in order to satisfy public clamor against the minority of Japanese ancestry, which had been whetted, rather than deterred, by the evacuation,[8] the WRA, in July, 1943, devised a set of criteria by which it could segregate a group of the evacuees for the purpose of according to them more rigorous treatment than that which was being condemned as overly sympathetic. Since none of the evacuees had performed any act of disloyalty or of any reprehensible nature, and since the intelligence investigations indicated no reason to restrain more than a handful as individually even potentially dangerous, some other criteria had to be devised [R. 94, 224-5; see App. Br. 24]. As the Project Attorney at Tule Lake stated with respect to segregation:

> "I am not prepared to say whether or not this procedure for making the determination of what individuals . . . should be gathered for segregation . . . was the best that could be devised. However, . . . under the pressure of public opinion, under the 'yammering' of certain elements of the public press, and under the bedevilment of prominent officials, the War Relocation Authority had to do a sorting job which affected some 110,000 residents . . . within an inconscionably short space of time, and under a procedure so hurried, so inconsiderate of human exigencies, and so complicated by relationships with other government agencies that no responsible official of the War Relocation Authority itself would maintain that a good job had been done" [R. 245].

For the most part the War Relocation Authority utilized requests by the evacuees for repatriation or expatria-

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[8]McWilliams, *Prejudice* (1944) p. 1.

tion to Japan as a basis for segregation, though it is unanimously conceded that many of these requests were motivated by numerous considerations which had no bearing on loyalty. Such requests came about because of the efforts of the United States Government, commencing in the summer of 1942, to arrange for the exchange of American citizens who were interned in Japan, in return for Japanese aliens or persons of Japanese ancestry in the United States. Many of the evacuees requesting repatriation or expatriation did so because they had lost all hope of reestablishing a decent life for themselves and their children in the United States. For, by the evacuation and detention the Government itself appeared to approve and entrench the racial discrimination which persons of the Japanese race had struggled to overcome in their pre-evacuation life; this fact was a source of great discouragement with respect to their future in the United States, as was the destruction by the evacuation of their hard-won economic and social foothold, the acts of violence against them prior to evacuation and against those few who left detention on a parole basis, and the agitation to expel them permanently from the West Coast, and to deport them therefrom in case of their return. Even when citizens did not themselves feel entirely hopeless about their future in the United States, some requested expatriation following repatriation requests by alien parents or spouses, because of their desire to maintain the family, a desire which was intensified by the general insecurity of their lives.[9]

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[9]On the repatriation requests generally, see R. 354, 36, 221-222; War Relocation Authority Report, quoted *infra;* Statement of Acting Director of WRA, Hearings before House Committee on Immigration and Naturalization, 78th Cong., 2d Sess. (1944) 57-58; T & N, 95-96.

Finally, a highly important factor in deportation requests was the fact that many evacuees, while hoping there would be a chance to reestablish their lives in the United States after the war, had an extreme fear of making this attempt for the duration of the war, because of the intensification of racial prejudice engendered by the war. Such evacuees hoped to find at Tule Lake a wartime refuge in which they could secure safety and stability for their families and avoid the relocation which was being made from the other camps [R. 37; T & N 88]. The extent of a feeling of hopelessness or a desire for refuge as a result of the rabid racial feeling and the evacuation and detention varied, of course, with the individual, depending not only on his pre-evacuation experiences and his losses at that time, but also on the manner of his evacuation itself, which varied in its harshness [T & N 22-23]. But all authorities agree that the need for "protective custody" due to racial prejudice, which was the reason detention was originally undertaken, was strongly felt as a necessity by many of the evacuees themselves and was a salient influence on their conduct at the time of segregation and throughout the detention program. However, in order to secure such refuge the evacuees *could not affirm a desire for it, but had to bring themselves within the classifications established by the War Relocation Authority* for those deserving of segregation. Thus, many evacuees requesting deportation did not in fact desire such deportation but hoped by virtue of the request that they could secure wartime protection. In this respect another phenomenon that was conspicuous throughout the detention program was evident in the segregation procedure: that is, the detainee's making of a statement for the purpose of securing as great personal and family security as possible

within the very limited opportunities open to him, regardless of whether the statement reflected the sentiment which the War Relocation Authority was theoretically attempting to ascertain [R. 37, 248-249, 225].[10]

The other major basis for segregation was the answers given to the so-called "loyalty" questionnaire. Only citizens of Japanese ancestry were forced to answer this questionnaire and no other citizens, even those of enemy ancestry, were similarly interrogated. The distribution of the loyalty questionnaire occurred in the following manner:

Despite the fact that approximately 600 soldiers of Japanese ancestry had been summarily discharged from the Army in February, 1942 "for the convenience of the Government," and were thereafter included in the evacuation and detention [R. 222-3], the Army in February, 1943, made an attempt to recruit in the detention camps special combat teams of American citizens of Japanese ancestry. A questionnaire was circulated in the camps by the Army and WRA in combination asking whether the citizens was willing to serve in combat wherever ordered, or, in the case of females, to volunteer for the Army Nurses Corps, or the WAAC, and whether he or she would swear unqualified loyalty to the United States, and forswear allegiance to Japan. Because of the Army's participation in the registration, and the general method of its conduct, the registration was generally viewed solely as a device for getting recruits; it was generally believed

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[10]The lack of correlation between a repatriation request and loyalty is indicated by the fact that none of the aliens segregated on this basis had been interned as dangerous enemy aliens despite the unusual breadth given to this classification in the case of Japanese [T & N, 5].

that the question of loyalty could not be answered affirmatively without volunteering to serve in the Army, and in fact those who attempted to do so were generally maneuvered into volunteering [R. 292]. Further, because of the preceding discharges from the Army, the en masse treatment of citizens of this race as "dangerous" in their evacuation and detention under military guard, and the Army's stated intention of placing them in special teams, it was commonly believed that an attempt would be made to put the recruits into special Jim Crow labor battalions [R. 292; McWilliams, p. 184].

An affidavit submitted by the Government states that negative answers to the questionnaire may have been due to "mistake," "distress," "confusion," or "resentment" [R. 93, 112]. A statement by the WRA contemporaneous with the registration explained the reasons more specifically, as follows:

> "Underlying the resistance to registration that prevailed . . . two factors stand out as primarily important: (1) evacuee resentment against the government resulting from evacuation and detention in relocation centers and (2) administrative miscalculations and errors of judgment both in the explanation and the execution of the registration program . . . After undergoing the extremely trying experiences of evacuation and the rigors of several months' detention . . . a considerable minority—particularly among the citizen group—was deeply resentful against the Federal Government and highly suspicious of any action it might take affecting their future status. This point of view is most sharply reflected in some of the qualified answers to Question 28 (regarding loyalty), such as 'Yes, if my civil rights are fully restored' . . . Some of the most thoroughly

> embittered citizens tended to regard the whole enlistment and registration as 'just another government trick'[11] and nearly 3000 of them actually went to the point of requesting expatriation to Japan. . . .
>
> "From the very beginning, the recruitment (for the Army) tended to obscure the real significance of registration . . . It is probably literally true that hundreds of the evacuees went through the registration without any real understanding of the significance of Question 28 . . ."[12]

Another considerable factor in the negative answers was the same view that had been reflected in some of the repatriation requests—that it was expedient to give a negative answer in order to secure refuge at Tule Lake for the duration [R. 113, 248, 225-226; T & N 89, 91].

Nevertheless, despite official knowledge of the extent to which neither deportation requests nor loyalty answers reflected "loyalty," or "dangerous" potentialities, the segregation was carried through on this basis. Thus, as will be seen in connection with the renunciation itself, and was apparent throughout the program, each projected administrative measure was carried through to its ultimate conclusion despite official knowledge that in practice it was not achieving the results which had been planned

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[11]In this connection some of the background must be borne in mind: after it had been announced that persons of Japanese ancestry need only evacuate the coastal strip and many had moved to the interior of California, they were again evacuated and incarcerated; after those in one locality had been ordered to leave but told they could go to locations of their own choosing, they were subjected to detention; and all found themselves under armed guard in detention after being told to report for evacuation.

[12]WRA, Semi-Annual Report, January 1 to June 30, 1943, pp. 11-14.

on paper. In addition to those segregated on these bases, the Tule Lake population included the 600 men discharged from the Army [R. 222], a group of about 6000 persons in Tule Lake who preferred to remain there in preference to again being transported to a substantially similar camp [R. 95],[13] and about 500 persons who were determined on an individual basis to be potentially "disloyal"; even as to the latter, however, the standard was merely whether the individual's release from detention might be deemed a security risk in view of the war emergency.[14] And about one-third of the Tule Lake population consisted of the dependents of segregees, who were permitted to accompany them to Tule Lake [The Evacuated People, p. 169]; thus, the three women appellees, each with three small children, were in Tule Lake by virtue of their alien husbands' respective requests for repatriation to Japan [R. 5, 6, 7, 314, 317].

(d) Conditions at Tule Lake Prior to Renunciation Program.

Even prior to the use of Tule Lake as a segregation center, this particular detention camp suffered from greater mismanagement and more discordant relations between the inmates and the administration officials than the other WRA camps [T & N 72, 40-42, 45]. After the segregation, which was substantially accomplished in the Fall of 1943 and completed by June 1944, intra-camp relations worsened markedly. As a result of the segregation those

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[13]Most of these eventually "'legitimized' their status by applying for repatriation or taking other similar officially sanctioned steps to become 'disloyal' . . ." [T & N, 104, n. 48].

[14]See Senate Document No. 96, 78th Cong., 1st Sess. (1943); WRA Regulations, dated January 1, 1944, 9 Fed. Reg. 154 (1944); Regulations printed at Appendix, p. IX, to Appellees' Brief, Sec. 110.3.

detainees who had assumed positions of leadership in various centers were concentrated in Tule Lake together with similar leaders of the Tule Lake old inmates [R. 44, 95, 225, 247, 251]. These various leaders contended for dominance and for this purpose played upon and built up the dissatisfactions of the other inmates [R. 97, 126, 227]. There was ample ground for such propaganda by virtue of the living conditions [R. 34, 88] and WRA's failure to carry out its assurances with respect to occupation and housing; and the new inmates, in particular, felt the brunt of the bad conditions at Tule Lake [R. 34, 88, T & N 103-104, 109-110]. The disappointment of their hopes with respect to life in Tule Lake, which were partly responsible for their decisions to go there, together with the favoritism to the old internees shown in the WRA policies [T & N 227-228], contributed to the dichotomy of reaction shown by the New and Old Tuleans, on which appellants comment in their Statement of Facts (App. Br. 11).

In any event, though all the "trouble-makers" from the other camps were concentrated in Tule Lake [R. 225, 247], and though political factionalism was obvious, the WRA took little notice of such intra-center problems. On the one hand, Tule Lake had many more aspects of a prison than the other centers [T & N 228, 237] with consequently greater feeling on the part of the inmates that the WRA officials were jailers and a lesser degree of amicable cooperation with them [R. 219]; on the other hand, while the inmates were closely confined with the "trouble-makers" and had none of the escapes from the ensuing friction which they would have in a normal community [R. 88], there was none of the close supervision of a prison which would have protected them from such influences [R. 225, 255, 126, 140-141].

The events of the martial law stockade period, beginning in the Fall of 1943 and ending at about the time of the passage of the renunciation statute in July 1944, have been noted in appellants' brief. This period of turmoil commenced with the WRA's sudden breach in its negotiations with the detainees employed as farm workers, with respect to safety and other measures, after an accident involving the death of one worker [T & N 128-130, 133-134; R. 39]. After a series of incidents which was thus precipitated, the WRA gave control of the center over to the Army and martial law was instituted in November 1943; this abrupt and drastic change in policy was a particular shock to the residents because it was unannounced and they learned of it only through finding soldiers equipped with tear gas, guns, and tanks in their path when they arose to go to work [R. 40-41, 98]. The most notable feature of martial law was the Army's procedure of imprisoning in a stockade, without hearing, those who were suspected of opposing the policies of the Camp administration; the stockade was continued in effect by the WRA after the termination of Army control, and was in use from November 1943 to June 1944 [R. 255, 296-297]. The fear of imprisonment in the stockade without charge or hearing caused suspicion and fear of anyone who was thought to be sympathetic with the Camp officials and who thus might be a source of a denunciation which would result in such summary imprisonment [T & N 224-225].

After the WRA resumed control of the Center, it attempted to utilize a committee of the detainees to establish greater harmony with the inmates. However, because, *inter alia*, of the WRA's inconsistency in dealing with this committee, as opposed to an anti-administration group [T & N 216-217, 234, 316-317]; because of its fail-

ure to take cognizance of the committee's requests with respect to conditions and its generally arbitrary conduct with respect to camp conditions; and because of the continuance of pick-ups for the stockade, and its failure to release from the stockade moderate leaders who would have cooperated with this committee [R. 226-227], the WRA was unsuccessful in undoing the effects of its other policies upon the detainees and in erasing their antagonism [T & N 187-189, 191-194, 197-201, 203, 216-219; see R. 44-45]. By the end of this period, that is, by June 1944, the anti-administration leaders had come to completely identify their cause with Japan and had become markedly pro-Japanese [R. 225; see T & N 363-370]. Thereafter, and particularly after the failure to apprehend the murderer of one of the major pro-administration leaders, the only organized movement in the camp was that of the Japanese-minded organizations [R. 105-106, 258, 51, 87, 109, 325-326]. These pro-Japanese organizations were by the Summer of 1944 out in the open and used WRA facilities for their meetings (see Appellants' Br. pp. 21-22). The camp administration itself appeared, by the Summer of 1944, to have largely abandoned the policy of facilitating and encouraging an American way of life on the part of the American citizen detainees, and to be primarily concerned with satisfying the pro-Japanese leaders [T & N 237].

(e) Enactment of Renunciation Statute.

The events of this period, in particular the violence in November 1943 and the invocation of martial law, gave renewed impetus to the public clamor that more stringent measures be taken against the evacuees [R. 98-99]. In part because of this clamor, and in part because of the view that the detention program might soon be invali-

dated,[15] and the release of all internees would be undesirable, the Department of Justice, which was now involved in the Tule Lake situation along with the Army and the WRA drafted and secured the enactment of the renunciation statute [R. 98-102]. The conception and purpose of this statute was as follows: the militant anti-administration and pro-Japanese leaders had stated that they had given up any expectations from the United States and that they wished to be treated as Japanese nationals [T & N 226-227, and App. Br. p. 21]. While officials recognized that the sentiments of this group were at least in part the result of the evacuation and detention [R. 99, 126], and while their bravado was not accompanied by any attempt to escape or other effort actually to aid Japan, it was determined by the Attorney General that steps should be taken to insure the detention of this group even if other detainees were released. While the alien members of this group could be interned for the duration of the war by the Attorney General under the alien enemy internment program which he administered, those who were native-born American citizens could not be so interned unless their citizenship was terminated. In view of their expressed desire to give up their status as Americans, it was believed that the device of renunciation could be used to effect such termination [R. 101-102].

The passage of the renunciation statute was announced in the Project newspaper [R. 50], and was applauded by the pro-Japanese leaders. They forthwith applied for renunciation[16] and adopted renunciation by all citizens in the

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[15]The *Endo* case, which resulted in the partial invalidation of detention by the Supreme Court (*Ex parte Endo,* 323 U. S. 283), was certified to that Court by this Court in June 1944.

[16]Such leaders have already been deported to Japan [R. 221]. As to the unfairness of some of the deportations, see R. 301, 302.

camp as a prime objective of their organizations. However, their propaganda was, despite the turbulent period the inmates had undergone, wholly ineffective on the other detainees.

2. THE RENUNCIATIONS.

Except for the events of December 1944, the only renunciants would have been this small pro-Japanese group for whom the statute was passed [T & N 356, 333], and 90% of the total number of renunciations, which were tendered in and after December, would not have occurred. Indeed, the citizens who renounced in and after December 1944, in the period hereinafter termed the mass renunciation period, were not citizens whom the Department of Justice had thought it desirable to incarcerate, but rather were intended, under the policy adopted in December 1944, to be released and resettled [T & N 356].

In December 1944, apparently precipitated by fear of the effect of the *Endo* decision, the policy of the WRA and the Army was suddenly and drastically changed. On December 18, contrary to previous assurance that the Tule Lake camp would be maintained for the duration of the war, and that persons who chose segregation could at least rely on the camp as a duration shelter [R. 136, 90], the War Relocation Authority announced that it would force resettlement by closing the camp within a year. At the same time the Army announced the Japanese-Americans except for individuals to be individually served with exclusion orders, would be allowed to return to the West Coast [T & N 333-335].

These announcements, and the preceding rumors that they would be issued [T & N 317], precipitated an upsurge in the violence on the West Coast against those few

Japanese-Americans who had returned thereto and vociferous threats against any others who might make the attempt to reestablish their residence. The San Francisco Chronicle and the San Francisco Examiner, which were the newspapers most widely read at Tule Lake, carried items that "to allow the Japanese to return during the war . . . would cause riots, turmoil, bloodshed" (San Francisco Chronicle, Dec. 13, 1944) and that their "return . . . is apt to result in 'wholesale bloodshed and violence'" (San Francisco Examiner, Dec. 13, 1944) [T & N 345; see also R. 77, 302, 298 as to the crescendo of threats of race violence]. And the danger of violence was exaggerated, even over and above that which actually existed, in the minds of the detainees in the Tule Lake Camp, because of their tension and uncertainty resulting from their experiences in the Camp, their isolation from normal contact with Caucasians, and the unchecked propaganda of the pro-Japanese element who played on the fears of the rest of the inmates [R. 88, 140, 232-233, 143, 38, T & N 349]. Fear, mounting to panic, which was thus engendered by the announcement of the camp closing was increased by the fact that most detainees had no financial resources with which to reestablish themselves because of their losses in the evacuation and the dwindling during the detention of whatever resources they had been able to salvage [R. 223-224]. And the detainees' optimism with respect to meeting the problems of resettlement was diminished by the experiences they had undergone, particularly the governmental adoption of race discrimination in the evacuation and detention [see R. 223].

The result of the WRA camp closing program and the Department of Justice's renunciation and alien enemy internment programs was that American citizens could de-

fend themselves against being forced to relocate in the face of the then existing circumstances only by renouncing their citizenship. Thus, their need for a place of refuge has been uniformly stated to be the primary reason for most of the renunciations in the mass renunciation period [R. 70, 73, 77, 90, 136-138, 302; T & N 333-339].

Allied to the need to renounce in order to secure a refuge, was the need to renounce in order to hold families together [R. 139, 232, 301, 302; T & N 350]. For, since aliens were subject to internment as well as to repatriation to Japan, and citizens were not, alien parents might well be separated from citizen children, alien husbands from citizens wives, and families in general permanently severed and scattered, unless the citizen members renounced. Further, it was thought that a renunciation might serve as had a request for repatriation; *i. e.*, if one member of a family renounced, all would be permitted to remain in the camp [T & N 339]. Finally, it appeared that all males who did not renounce would be forthwith drafted, and the apprehension of Jim Crow labor battalions persisted [R. 233, 72, 302].

The Department of Justice officials who determined to accept the renunciations from the inmates of the Tule Lake and other camps were well aware of these factors propelling them into the renunciations [T & N 356, R. 136]. Nothing was done to counteract the panic and apprehension, the rumor and conjecture, which prevailed in the camps, particularly Tule Lake [see partial admission of this fact in appellants' answer, R. 21-22]. However, it

is to be conceded that a good part of the panic arose not from rumor or confusion but from the realities of the Government's programs, and could not be dissipated so long as each agency insisted on persisting in its own program [*Cf.* R. 137, and 231, 249; T & N 356].

There is some dispute among the affiants as to the importance during the mass renunciation period at Tule Lake of threats and violence by the pro-Japanese organizations against the other inmates [R. 118, 126, 127]. But some facts as to these organizations and the violence are uncontroverted. The organizations had come into powerful positions in the Tule Lake community with the assistance of the WRA [R. 325-326]; and they adopted renunciation as a primary objective [T & N 333]. In January 1944, appellants' affiant who later questioned the degree of physical violence used by these organizations to obtain their objective, stated his awareness that they had so employed violence [R. 216]. It is also unquestioned that one opponent of these organizations was murdered in July 1944 and that assaults on such opponents were reported in October and November [R. 58, 60, 228, 80; T & N 319]. None of the assailants was apprehended, nor effective steps taken to deter further assaults [R. 48-49, 255-256, 228, 58-59; T & N 277 ff]. Whether all or any of these assaults were for the purpose of coercing a renunciation, it is undenied that rumor of terrorist gangs and assaults filled the camp [R. 218, 32, 126], that it was generally believed that opponents of these organizations were in danger of attack [R. 61, 218], and that neither the WRA

nor any other agency gave adequate protection against such attacks [R. 255].

Aside from actual physical violence, it is also undenied that these organizations had been for an extended period the only organized voice of public opinion in the camp, and that they attempted to create an atmosphere of censure and disapproval of non-renunciants [see T & N 354, R. 326]. They engaged in open demonstrations of militant strength, and only a few persons of unusual physical courage openly expressed opposition to them [R. 257]. When the WRA announcement of the closing of the Camp made it necessary for the residents to consider the possibility of renunciation, the organizations increased their drills and displays [R. 109, 119]; and their militancy was virtually unchecked during the most of the period when Department of Justice officials were at the Camp receiving renunciation declarations [T & N 341, R. 326, 87].[17] During the mass renunciation period, their "pressure upon the general population involved intensification of nationalistic activities, coercive and terroristic tactics directed against dissenters, and extensive propaganda" [T & N 341].

Finally, in view of the numerous shifts of administration policy, including shifts with respect to the effect of

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[17]The Department unwittingly abetted them in their boasts that they had special access to the Government agencies, by giving them priority in removing them to places of internment, a move which was deemed by the other residents, who were desperate for a refuge, a reward rather than a punishment [T & N 341-342].

statements by the detainees themselves such as those in regard to segregation, registration and expatriation [see R. 136], there was a tendency to believe that the renunciations likewise might not commit them irrevocably [R. 90, 192, 249, 291-292]. In any event, in the panic and hysteria prevailing in the Tule Lake Camp [R. 79, 89, 126] renunciation was regarded as a necessity in order to solve pressing problems of personal safety and family security.

All four appellees renounced during the mass renunciation period [R. 4, 5, 6, 7], and three were in the Tule Lake Camp. Each of these three was an American-born woman with three small children and each was married to a Japanese alien. Each was in the Tule Lake Camp by reason of her husband's request for repatriation, and her decision to accompany her husband to the segregation camp. The fourth appellee, Inouye, was a boy of 15 when he was evacuated and was just over 18 when he renounced during the mass renunciation period. His parents were both aliens, but did not apply for repatriation until this period and hence Inouye and his parents had not been segregated to Tule Lake. Soon after release from detention he volunteered for service in the United States Army and is now serving therein [R. 4, 333].

SUMMARY OF ARGUMENT.

The renunciations herein are invalid because made while the renunciants were in detention, which, with its preceding and concomitant circumstances, establishes a lack of free choice as a matter of law. At the very least it should be held that renunciations other than those made directly after passage of the renunciation statute by the defiant group at whom the statute was aimed, are invalid because (1) the statute, read in the light of its statutory purpose, did not authorize the Attorney General to terminate the citizenship of such other renunciants; and (2) because the circumstances under which such later mass renunciations were made establish the lack of free choice of the renunciants as a matter of law. If both these rules are rejected, appellees have established that they individually were coerced by the circumstances prevailing during the mass renunciation period and that their renunciations were therefore involuntary. The findings by both lower courts to the latter effect not being clearly erroneous, the judgments will be affirmed by this Court.

The District Court in case No. 11839 had jurisdiction under 8 U. S. C. 903 because the facts were proved that appellants denied appellees' rights as nationals (1) by the admission of these facts by appellants in their answer and (2) because the illegal acceptance by the Attorney General of the renunciations resulting in loss of citizenship is sufficient. The finding by the lower court in case No. 11839 that Inouye renounced as a result of undue influence and parental coercion is amply supported by the evidence and not being clearly erroneous will be affirmed by this Court. And finally, a minor under the age of 21 has no capacity to renounce under 8 U. S. C. 801(i).

ARGUMENT.

I.

The Lower Courts' Determination That the Appellees' Declarations of Renunciation Were Involuntary and That the Termination of Their Citizenship Was Therefore Invalid, Should Be Affirmed (Appellants' Points II and IV).

A.

The Applicable Principles of Law in Determining Validity of Renunciations.

The invalidation by the lower courts of appellees' renunciations, and that by another district court in this Circuit[17a] of the renunciations of other American citizens of Japanese ancestry who were similarly situated, rests basically on the ground that declarations of renunciation made under the circumstances to which such citizens were at the time of renunciation and had theretofore been subject, were not the result of a free, intelligent, and voluntary choice, and were therefore invalid under the renunciation statute. In these decisions the lower courts have taken the same approach to the statute as that of the Court of Appeals for the Third Circuit, with respect to another section thereof, in the case of *Doreau v. Marshall* (not reported, decided August 23, 1948). In that case the Court of Appeals, considering the validity of a renunciation made under abnormal wartime circumstances, followed the Supreme Court's opinion that an act of expatriation was effective only if voluntary,[18] and held that

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[17a] *Abo v. Clark*, 77 Fed. Supp. 806 (D. C. N. D. Cal. 1948).

[18] *Perkins v. Elg*, 307 U. S. 325, 334: "Expatriation is the voluntary renunciation or abandonment of nationality and allegiance."

the pressure of such circumstances as alleged by *Doreau* was to be deemed "duress" and a renunciation made thereunder invalid.[19]

That case is noteworthy as an instance of judicial protection against the permanent loss of citizenship where the choice to renounce has not been based on a reasoned appraisal of normal conditions, but has instead been made under the pressure of wartime emergency. There, as here, the question before the Court was: of what influences must the citizen be free in order to have the free choice contemplated by the statute? But here the analogy between that case and the instant one stops: for the circumstances in the case at bar are incomparably more compelling to the decision that the renunciations were involuntary and that it would be unfair and unlawful for the Government to take advantage of them. For here not only were the renunciations made under the stress and pressure of temporary and highly abnormal conditions but, further, this Government was itself largely responsible for many of such stresses and pressures and, even further, the major influence was one which is contrary to the very spirit of the Constitution: racial discrimination.

Instead of considering the effect of the influences and pressures, and in particular the racial discrimination, of which the record gives uncontroverted and incontrovertible proof, the appellants continue to support the position

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[19]See District Court cases likewise holding that expatriation can only be accomplished by a voluntary act, and invalidating "involuntary" renunciations made during World War II: *In the Matter of Andrew Gogal,* 75 Fed. Supp. 268 (W. D. Pa., 1947); *Schioler v. United States,* 75 Fed. Supp. 353 (N. D. E. D. Ill., 1948). *Cf. United States ex rel Fracassi v. Karnuth,* 19 Fed. Supp. 581 (W. D. N. Y., 1937).

taken from the inception of the renunciation program by officials of the Department of Justice; that is, while they apparently concede that an involuntary renunciation is invalid, they will not take cognizance of any circumstances affecting the free choice of the renunciants other than the renunciants' fear of immediate physical injury at the hands of other inmates of the detention camp [R. 114, 115, 130-131; App. Br. pp. 42-43, 55-57].

This position on duress is not supported by the *Doreau* and the District Court cases relating to the instant statute, nor, we believe, by any other cases or doctrines. For

> "'Conduct under duress involves a choice'; *Union Pac. R. Co. v. Public Service Commission,* 248 U. S. 67, 70, and conduct devoid of physical pressure but not leaving a free exercise of choice is the product of duress as much so as choice reflecting physical constraint." (Justice Frankfurter concurring in *Haley v. Ohio,* 332 U. S. 596, 606.)

The appellants' approach to the question of free choice seems to be premised on its concept of contract law, which is the major basis for all its arguments; while appellants' apparent view of duress in the law of contracts seems to us outmoded and clearly erroneous, we shall not expatiate on this point because we believe that this aspect of the law of contracts, as well as all other aspects, are wholly and completely inapplicable to the case at bar. The appellants, seemingly, have become entangled in their attempt to apply contract law because under the renunciation program the divestment of citizenship by the Government, through the Attorney General, was predicated on a statement by the individual divested. But an analysis of the legal questions before this Court on the basis of

contract law seems naive in view of the large body of public law relating to the determination of whether a relinquishment of a right is to be deemed "voluntary" and valid. In every such case,—whether the question be the validity of the relinquishment of the right to counsel or to a jury, or the validity of a confession or of a plea of guilty,—the courts protect the individual from the consequences of his own statements as against "overzealous" officials who have acted on the basis thereof.[20] It would seem clear that this body of law, relating to governmental action, is apposite in the determination of the instant case, rather than private contract law which deals with an exchange of consideration between two private parties or with the Government acting in its private and proprietary capacity.[21]

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[20]"Experience has counseled that safeguards must be provided against the dangers of the overzealous as well as the despotic." *McNabb v. United States,* 318 U. S. 332, 343. See also *Von Moltke v. Gillies,* 332 U. S. 708, 722; *Trupiano v. United States,* 332 U. S. 841. The Courts perform a similar protective function in every case where it is decided to reverse a conviction because of the method by which evidence was obtained, as by an entrapment (see *Sorrells v. United States,* 287 U. S. 435; *Morei v. United States,* 127 F. 2d 827, 833 (C. C. A. 6th, 1942); *Weathers v. United States,* 126 F. 2d 118, 119 (C. A. 5th, 1942)), or by an invalid search and seizure. (See *McDonald v. United States,* No. 36, October Term 1948, decided December 13, 1948, and cases there cited.) In all such cases there exists the requisite basis of evidence upon which the law prescribes that action against the individual is to be taken, but the courts determine that because of the circumstances under which the evidence was obtained, such action cannot be permitted to follow.

[21]This view is implicit in Judge Cavanah's opinion [R. 336-339] and is made explicit by Judge Goodman in the *Abo* case in his rejection of the Government's position and his citation of *McNabb v. United States,* 318 U. S. 32, a confession case.

B.

Invalidity of All Renunciations Made in Detention.

While we shall give further attention below to the details of appellants' argument, on the view we urge as our primary position it is not necessary for us to come to a consideration of most of them. For it is our view, on the basis of the relinquishment of rights cases, that any renunciation made by an American citizen of Japanese ancestry while in detention, with the possible exception of those renunciants already deported to Japan, is invalid. We submit that such a depreciation and obliteration of the value of citizenship as had been experienced by every citizen in detention was a "subverting factor"[22] without more, which had the effect of preventing an intelligent and reasonable appraisal of citizenship and its renunciation. The situation is highly analogous to that in which waivers of the right to counsel, and of the right to trial and against self-incrimination by a guilty plea, have been held invalid, most of which are premised fundamentally on the waiver's inability for one or another reason to fully appreciate the value of the right waived.[23] Of particular interest is the recent case of *Von Moltke v. Gillies,* 332 U. S. 708; there four justices, holding that the waiver

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[22]See *Von Moltke v. Gillies,* separate opinion of Justice Frankfurter, 332 U. S. 708, 727.

[23]As to waiver of the right to counsel, compare *Adams v. United States ex rel McCann,* 317 U. S. 269, 279; *Johnson v. Zerbst,* 304 U. S. 458, 464; *Glasser v. United States,* 315 U. S. 60, 71; as to invalidity of a plea of guilty, see *Uveges v. Commonwealth of Pennsylvania,* No. 75, October Term 1948, decided December 13, 1948, where the defendant's failure to appreciate the value of the contrary plea was in part due to the Court's conduct; *Townsend v. Burke,* 334 U. S. 736; *DeMeerleer v. Michigan,* 329 U. S. 663; *Williams v. Kaiser,* 323 U. S. 471, 475.

of counsel at the trial was invalid, pointed out Von Moltke's unawareness of the benefit that counsel could render her and further pointed out that the behavior of the court itself at the arraignment with respect to counsel "might be enough in itself to convince one like petitioner . . . that a waiver of this right to counsel was no great loss . . ." (at p. 723). Two justices in a separate opinion held that if Von Moltke's plea of guilty was based on honest but erroneous advice as to the value of the contrary plea, her plea of guilty was invalid. And in *Haley v. Ohio,* 332 U. S. 596, the Court held a confession invalid, stating *inter alia* that it could not assume under the circumstances there shown that the confessor fully appreciated his constitutional rights.[24]

A brief recapitulation of the evacuation and detention will show the overwhelming nature of the influences affecting the capacity of each and every citizen in detention to appraise the value of American citizenship. The severity of deportation has been emphasized by this and other Courts;[25] accordingly, it is to be borne in mind that all citizens in detention had been expelled from their homes in a measure tantamount to deportation, and that the impact of this step was accentuated by the fact that the individual was precipitously uprooted with no information as to his future or destination (Statement of Facts, *supra,* p. 6).

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[24]This case, as most of the confession cases, also involved the element of the individual's making the confession as an expedient to avoid immediate threats and dangers. These cases are discussed *infra,* p. 47.

[25]*Carmichael v. Delaney,* 170 F. 2d 239 (C. C. A. 9th, 1948); *Fong Haw Tan v. Phelan,* 333 U. S. 6, 10; *Delgadillo v. Carmichael,* 332 U. S. 388, 391; *Bridges v. Wixon,* 326 U. S. 135, 154; *Ng Fung Ho v. White,* 259 U. S. 276, 284.

And the shock was even greater because this deportation was not, as in the usual case, the foreseeable result of any act on the part of the individual but was instead a Governmental adoption of racial discrimination against which the evacuees had been lead to believe they had Government support. These citizens were then herded into "barbed wire enclosures, guarded by armed soldiers, under conditions of great oppression and humiliation"[26] where they were, though not detained because of any culpability, guarded and treated as prisoners.[27] No distinction was made in these unprecedented racial measures on the basis of citizenship, and in view of the governmental obliteration of the distinction between alienage and citizenship for this racial group and the total lack of value of citizenship for persons of this race, General DeWitt's widely quoted statement that "once a Jap, always a Jap"[28] was merely an articulation of a premise already unmistakably demonstrated by the Government's policy.

The evacuation, and the curfew which preceded it, while upheld as constitutional, were tolerated by the Supreme Court only on the basis that "direst emergency" and "apprehension of gravest imminent danger to the public safety"[29] permitted these unprecedented instances of the "odious" practice[30] of treating Americans in racial groups. But these citizens were then forced into racial detention for no more compelling reason than that otherwise race

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[26]Chief Judge Denman concurring, in *Takeguma v. United States,* 156 F. 2d 437, 442 (C. A. 9th, 1946).

[27]T & N 23-32.

[28]R. 222; T & N 20.

[29]*Korematsu v. United States,* 323 U. S. 214, 216.

[30]*Hirabayashi v. United States,* 320 U. S. 81, 100.

prejudice against them might have caused "some untoward incident."[31] The consequences to democratic processes of such governmental subservience to threats of violence and such governmental adoption of the objective of the lawless is too obvious to require extended discussion; we merely note that restraints upon the rights of those threatened by violence have been judicially condemned even where the restraint has been far less drastic than the detention here involved, and even though the restraint has been defended as a necessary police expedient in place of the alternative of measures against persons attempting violence.[32] Here not only did the detention result from a yielding to threats of violence but, in addition, from a compliance with racial prejudice. While we believe that the detention, at least to the extent that it exceeded a merely transient one,[33] was unconstitutional, we do not think it necessary for this Court to pass directly upon this point; for even if the detention might be upheld as an emergency solution to a "pressing public necessity,"[34] there can be no doubt that it was even closer to

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[31]See contemporaneous statement of General DeWitt's Assistant Chief of Staff, Civil Affairs Division, who recommended detention, in House of Representatives Report No. 1911, Preliminary Report of Committee Investigating National Defense Migration, 77th Cong., 2d Sess. (1942) 6, 8. And see to the same effect *Ex parte Endo,* 323 U. S. 283, 295-296, quoting General DeWitt's Report.

[32]See *Hague v. C. I. O.,* 307 U. S. 496, 516; *Thornhill v. Alabama,* 310 U. S. 88; *Johnson v. Sellers,* 163 F. 2d 877 (C. A. 8th, 1947), cert. den. 332 U. S. 851.

[33]Compare *Korematsu v. United States,* 323 U. S. 214, 217, and *Ex parte Endo,* 323 U. S. 283.

[34]See *Korematsu v. United States,* at p. 216.

the borderline of unconstitutionality than the curfew and evacuation, and that it was an even more extraordinary example of unprecedented race discrimination. Thus, it is clear that the evacuation and, even more, the detention, did not fulfill the right which American citizenship normally entails to equal and individual treatment regardless of race. And it seems equally clear that an experience with drastic racial inequality such as was suffered by the detained American citizens, with no prospect or assurrance that racial equality would be restored, would tend to affect and overwhelm their viewpoint towards citizenship.[35] As a result, it would be highly likely that their renunciation of citizenship would not be made with a full and clear appreciation of the value of American citizenship, of which racial equality is an essential. Accordingly their renunciation would not be a voluntary choice within the legal connotation of that term;[36] for we submit that the statute must be held to contemplate a choice to renounce or retain citizenship on the basis of a deliberate and measured appraisal of American citizenship with the citizen's capacity to reason and deliberate unconfused and uninfluenced by gross and extraordinary racial discrimination.

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[35]"It was because the United States first cruelly wronged us by an illegal if not criminal imprisonment that their renunciation came." Chief Judge Denman, concurring, in *Takeguma v. United States, loc. cit. supra,* note 26.

The factor of detention was also stressed in the instant case by Judge Cavanah [R. 332] and in the *Abo* case by Judge Goodman (77 Fed. Supp. at 810).

[36]See cases cited *supra,* notes 18 and 19,

1. Inappropriateness of Individual Proof.

The Government has urged both in this and the *Abo* case that each individual renunciant must be put to his proof.[37] But if, as we urge, a renunciation influenced by a lack of a clear appreciation of citizenship due to the gross racial discrimination, cannot be deemed reasoned, free, and voluntary, then we believe the renunciant's case is established as a matter of law by the fact that he was in detention, and there is indeed no rebutting proof for the Government to submit. For when it is established that the renunciant was in detention and thus that he was subject to the abnormal and subverting influence of the racial discriminations above discussed, the most that the Government could possibly show would be that the individual's life history and activities were such that he *might* have renounced his citizenship regardless of this influence. But such proof is irrelevant. For it is clear, under analogous decisions on the voluntary nature of a relinquishment of rights, that once the relinquishment is shown to have been made under circumstances which should not be permitted to influence it, the Court does not consider whether in fact the relinquishment was so influenced, or might have

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[37]Though Judge Goodman did not accede to this argument, he adopted the theory of individual presentation to the extent that he afforded the Government the opportunity of introducing proof to rebut the presumption of lack of free choice which he deemed to be established by the showing of the general circumstances under which the mass renunciations occurred. It is not at all clear, however, what is, in Judge Goodman's opinion, the ultimate fact to be proved. However, if this Court determines, as we urge, that the fact that the renunciant was in detention is sufficient to invalidate the renunciation, these additional circumstances need not be considered.

been made regardless of such influence.[38] Thus, in summing up the Supreme Court's doctrine as to when a confession (by which a defendant relinquishes the right against self-incrimination) is not to be deemed the product of a free and reasoned choice, Mr. Justice Reed pointed out:

> "A court never knows whether a confession is or is not voluntary. It bars confessions on uncontroverted proof of facts which as a matter of law are deemed so coercive as to be likely to produce an involuntary confession."[39]

So, too, the Court had said earlier:

> "(A) situation such as that here shown by contradicted evidence is so inherently coercive that its very existence is irreconcilable with the possession of mental freedom . . ."

and refused to consider whether the defendant's choice had in fact been affected by the situation.[40] The doctrine

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[38]Compare *Schioler v. United States,* cited *supra,* note 19, relating to the instant statute, where the Court ignored the question whether the renunciant might have desired to give up American citizenship regardless of the special pressures which were held to establish her lack of free choice; a tendency to so desire would seem a particularly conspicuous possibility since the renunciant's husband was of Danish ancestry, both he and the renunciant had resided in Denmark for ten years before the renunciation, and the renunciant did not attempt to have it voided until after her husband's death four years later.

[39]Justice Reed, dissenting, in *Upshaw v. United States,* No. 98, October Term 1948, decided December 13, 1948.

[40]*Ashcraft v. Tennessee,* 322 U. S. 143, 154; and see analysis of the majority opinion in dissent of Justice Jackson. And in *Lyons v. Oklahoma,* 322 U. S. 596, while the Court found that the situation there was not inherently coercive, it again affirmed that a confession would be deemed invalid as a matter of law "when conceded facts exist which are irreconcilable with . . . mental freedom" (at p. 602). Accord: *Malinski v. New York,* 324 U. S. 401, 404.

is likewise well illustrated in the recent case of *Haley v. Ohio*, 332 U. S. 596.[41]

The seeming rationale of the Supreme Court's doctrine that a confession made under circumstances likely to subvert a free choice is to be deemed invalid as a matter of law, is fully applicable to the case at bar and dictates that the doctrine should be here applied. Since history cannot be reversed, and the relinquishment of rights, whether by confession or as in the instant case by renunciation, was in fact made under circumstances likely to subvert a free choice, it is clear that *no* proof can eliminate the very real possibility that it was the subverting circumstances which caused the relinquishment; and the Governments taking advantage of a relinquishment influenced by such circumstances is deemed so unfair and unjust that the courts utilize a doctrine which will prevent the possibility of this result. Furthermore, an attempt to estimate whether or not the relinquishment would have been made if the subverting circumstances had not existed would necessitate an appraisal of a subjective state of mind with a weighing of imponderables which no court or jury is

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[41]There the Court held the confession invalid on the ground that the "undisputed evidence *suggests* force was used to secure the confession" (italics added), and was not concerned with whether the confession *might* have been made, in the absence of the disapproved circumstances, with whether such circumstances were the chief cause for the confession, or any other similar questions. If circumstances which are deemed highly likely to interfere with a free choice are shown, the confession is *per se* invalid; further, the individual is protected against any possibility of damage by reason of having made a statement under these circumstances in that his conviction is reversed regardless of the fact that there is sufficient evidence other than the confession to support, the conviction. The Court "will not permit the conviction though there might have been sufficient other evidence for submission to the jury." *Haley v. Ohio,* at p. 599; *Lee v. Mississippi,* 332 U. S. 742.

equipped to make; thus, unless the rule of the invalidity of the relinquishment as a matter of law were adopted, not only would a relinquishment be held valid despite the ever-present possibility that it was influenced by the subverting circumstances, but also the estimate, on the basis of probabilities, that it was not so influenced would be particularly open to error. Thus, in the case of the renunciants, despite whatever evidence the Government could submit as to indications of a renunciant's attachment to Japan, the likelihood would remain, regardless of individual factors, that the renunciation would not have occurred but for the influence of the extraordinary racial discrimination on the citizen's view as to the value of his citizenship and of his future in the United States;[42] and any determination that this influence was insubstantial would be based on a highly problematical evaluation of the degree to which such discrimination influenced that particular citizen's reactions.

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[42]Not only would this likelihood remain in every case, but, indeed, there would seemingly be no case in which even a probability could be established that the renunciation would have occurred absent the discrimination. For it is to be borne in mind that there was no individual who had committed any act of disloyalty before the program of racial discrimination commenced, and, indeed that none attempted to commit any act detrimental to the United States thereafter. The renunciants' behavior after the evacuation and detention is not, of course, persuasive one way or the other as to whether such behavior, or the renunciations themselves were influenced by the evacuation and detention. As to the effect of governmental race discrimination on the "disloyalty" of a leading "disloyal," see "Life History of a Disloyal," T & N, pp. 363-370, especially 369. It is to be noted in passing that the conduct which various government agencies classified as "disloyal" was not "disloyal" except by the standards of these agencies, which were forced to establish some standard of disloyalty in part by public clamor (*supra*, p. 7); that such conduct was not unlawful, and was not harmful to the war effort of the United States.

The fact that not *all* citizens who had experienced evacuation and detention renounced does not at all affect the force of our argument; for it is our contention that while the determination to renounce did not uniformly result from this experience, that it is highly likely, and no proof can eliminate the probability, that the gross racial discrimination and deprivation of the evacuation and detention was a decisive influence upon all those who did renounce.[43]

We submit that it is incumbent upon this court to hold all renunciations in racial detention involuntary as a matter of law and thus prevent the possibility of the enforcement of a renunciation so influenced.

For it is to be borne in mind that even the evacuation was countenanced only because of "direst emergency"[44] and the prolonged detention, if constitutional at all, was indubitably justifiable only as a crisis measure. Thus, to

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[43]Whether or not the discriminatory experience resulted in a determination to renounce, depended, of course, on pre-disposing individual factors, as in every case of an involuntary relinquishment. Thus, for example, in *Ashcraft v. Tennessee,* cited *supra,* note 40, if Ashcraft's reactions were to be minutely analyzed, his confession was not only due to the prolonged questioning, but also to his physical and mental constitution, at the time of the questioning; however, the questioning was held inherently coercive and the confession coerced as a matter of law because of the likelihood that such questioning would overcome any individual's free choice, regardless of his individual constitution.

As a factual matter we deny that the pre-disposing individual factor in the case of the renunciants was attachment to Japan; rather it may well have been the degree of disillusionment arising from the discrimination because of prior hope for life in this country. See again "Life History of a 'Disloyal,'" T & N, p. 369.

[44]*Korematsu v. United States, loc. cit. supra,* note 29.

permit the influence of these measures to be in any way or to any extent perpetuated is clearly contrary to the spirit of the Constitution and of the Supreme Court's rulings, and to the public policy of the United States.[45] For freedom from racial discrimination is to be scrupulously and specially safeguarded from infringement, whether by direct and obvious means or indirect and veiled.[46] Further, the use of a rule of law that will prevent the possible validation of a renunciation influenced by these measures of racial discrimination is dictated by a consideration of the status of the right here renounced. For the right to citizenship is specifically guaranteed on a basis of equality to all persons born in the United States by the Fourteenth Amendment. Moreover, since the right of a racial group is here at issue, the very purpose of the guarantee,[47] which was to prevent racial inequality with respect to citizenship, is at stake. Even without considering the influence of racial discrimination upon the renunciants, extreme caution with respect to validating the renunciations would be indicated. For it is to be presumed from the mere fact that only persons of the Japanese race have been adversely affected by the renunciation program, that an unlawful discrimination has occurred. In an accumulating volume of opinion the Supreme Court has held that a mere showing of a measure's impact only

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[45]*Bob-Lo v. Michigan,* 333 U. S. 28; *Shelley v. Kraemer,* 334 U. S. 1.

[46]*Oyama v. State of California,* 332 U. S. 633, 636; *Patton v. Mississippi,* 332 U. S. 463.

[47]*Hague v. C. I. O.,* 307 U. S. 496, 509-510; *Rice v. Elmore,* 165 F. 2d 387 (C. A. 4th, 1947).

upon, or very largely upon, one racial group creates a presumption of an unconstitutional racial discrimination.[48]

In view of the important public policy considerations thus involved in the renunciations in detention, the invalidation of all such renunciations as a matter of law is dictated by yet another principle found in the confessions cases. For the situation is highly analogous to that in which the Federal Courts have held that a confession made while being illegally detained by Federal officers is invalid as a matter of law; the theory of these cases is that the courts should express disapproval of the conditions under which the confession was made and should prevent Federal officers from benefiting from "the fruit of their wrongdoing."[49] While the influence here—racial discrimination—was not of course applied deliberately for the purpose of bringing about the renunciations, we believe it is of as great importance as in the confessions cases, in view of the important public policy here involved, for this Court to disapprove of the use of renunciations made during the detention here involved and hold them invalid as a matter of law.

Finally, the rule of invalidity as a matter of law renunciations in racial detention must be adopted because the statute "touches the sensitive area of rights specifically

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[48]*Patton v. Mississippi,* 332 U. S. 463; *Korematsu v. United States,* 323 U. S. at p. 216; *Hill v. Texas,* 316 U. S. 400; *Norris v. Alabama,* 294 U. S. 587; compare *Yick Wo v. Hopkins,* 118 U. S. 356. And see Justices Murphy and Rutledge concurring in *Oyama v. California,* 332 U. S. at 661, and noting that the object of the statute had been discriminatory because 73 of the 79 actions taken thereunder had been against Japanese.

[49]*Upshaw v. United States,* No. 98, October Term 1948, decided December 13, 1948; reasserting the doctrine of *McNabb v. United States,* 318 U. S. 322.

guaranteed by the Constitution" (*Ex parte Endo,* 323 U. S. 283, 299); thus, the customary rule[50] of construing a statute, if possible, so as to render it constitutional, takes on unusual gravity, and the statute must be construed so as to fully safeguard constitutional principles. And "since the stakes are considerable for the individual," a construction favorable to the freedom of the individual is to be assumed. *Fong Haw Tan v. Phelan,* 333 U. S. 6. And the construtcion we have urged, which gives fullest expression to the principle of racial equality implements the principle of interpreting statutes in harmony with the "general spirit of our institutions."[51]

C.

Invalidity of Renunciations During Mass Renunciation Period.

1. Statutory Power Restricted to Defiant Group.

Assuming *arguendo* that this Court rejects the position we have urged in Section "B" that all renunciations by American citizens of Japanese ancestry while in detention were involuntary and invalid, we argue that at the least all renunciations but those made directly after the passage of the statute, that is, from July to October, 1944, are invalid. At the outset it would appear that the subsequent renunciations cannot be deemed authorized by the statute; for it was enacted for the purpose of terminating the citizenship of, and then interning as enemy aliens, the small group of citizens who had prior to its passage dis-

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[50]See *United States v. Congress of Industrial Organizations,* 335 U. S. 106, 121, citing other cases.

[51]*Potash v. District Director of Immigration,* 169 F. 2d 747 (C. C. A. 2d, 1948).

played an attitude of bravado and rejection of American citizenship, and who forthwith upon enactment applied for renunciation; most if not all such renunciants have already been deported [R. 221].

Further, it is clear that the Congressional intent did not contemplate termination of citizenship on the basis of renunciations made under the circumstances which reached their climax during the mass renunciation period, that is, the period subsequent to October, 1944, after the renunciations of the defiant group at whom the statute was directed. It is established doctrine that a statute must be read in the light of its purpose; here the purpose was so clearly to authorize the Attorney General to terminate the citizenship only of the small group heretofore mentioned, that the statute must be construed to the same effect as if it had so restricted the Attorney General's authority in explicit language.[52] Particularly is this limited construction to be here adopted because a limitation is in any event to be favored where an expanded construction would permit of interference with important personal rights (see cases cited *supra,* p. 41). Thus, the statute did not authorize the termination of the citizenship of the mass of renunciants who were in an entirely different category from the group whom the statute was intended to cover.

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[52]See *United States v. Congress of Industrial Organizations,* 335 U. S. 106, 112, holding that an indictment did not state an offense within the terms of the statute there involved because such terms had to be restricted to the Congressional purpose, as shown by the legislative history; see also to the same effect, *Mitchell v. Cohen,* 332 U. S. 754.

2. Circumstances Subverting Free Choice.

In addition, the circumstances under which the later renunciations were made, added to the influence of the detention already discussed, unquestionably must be deemed to have overcome the renunciants' voluntary choice which the statute must have contemplated as a prerequisite to a valid renunciation.

The circumstance which exerted the greatest influence during the mass renunciation period was concededly these hapless citizens' need for a place of refuge. This need became a crucial one as a result of the rumors, and then the definite announcement, that the WRA camps would be closed within a year. To appreciate the extent to which the evacuated citizens felt compelled to secure refuge from the Government, it is to be recalled that even at the commencement of the evacuation program the whole of the first group evacuated, who were given their choice of destination, chose a Government camp. And fear of relocation had played a salient part in all stages of the evacuation and detention program. But by the time of the announcement of closing the camps, the circumstances creating a need for a place of refuge had mounted to a climax. For the continued detention of these citizens had increased the hostility towards them on the West Coast by reinforcing the view of those who had long sought their ouster and who had welcomed the evacuation, that their expulsion was permanent; further, the prolonged detention had created a deepening opposition to their return on the part of those who had succeeded to their homes, businesses, and economic interests. Those few citizens who had returned encountered violence in the form of assaults and attempts to burn their homes; when, even before the

actual announcement on December 19th that the citizens of Japanese ancestry would be allowed to return en masse, rumors to this effect commenced, violence increased and threats reached a new height. (See Statement of Facts, *supra,* pp. 18-19).

In addition to the fear of violence, the other factors impelling the evacuees throughout the program to seek refuge had also become intensified by the time of the announcement of December 19th. These factors were, chiefly, the dwindling of whatever financial resources had not been lost in the evacuation; these citizens' long isolation from normal living and from the Caucasian community; their unrelieved discouragement and disillusionment as a result of the Government's continuance of its program of racial discrimination; and that continued evidence of the Government's failure to give adequate protection against violence, compensation for material losses, or other assistance to these citizens in reestablishing themselves in the community. To fully appreciate the state of despair and panic engendered by the WRA announcement in the Tule Lake Camp, it is also to be borne in mind that the citizens therein had accustomed themselves for over two years to reliance on assurances that they would not be forced to leave the camp for the duration of the war while race prejudice was at its height (*Id., supra,* p. 18).

In the face of the extreme hopelessness and apprehension felt by these citizens with respect to being expelled from their places of refuge, the Government offered them neither protection nor refuge except through renunciation of citizenship and internment as aliens or, along therewith, deportation to Japan (*Id., supra,* p. 17). Thus, in the terminal phase of the racial discrimination program, the Government went even further in its depreciation of

the value of citizenship for persons of the Japanese race than it had in the previous phases of the program; in the renunciation program it not only accorded no greater value to citizenship than to alienage, but in fact, from the standpoint of meeting the citizens' need for refuge, accorded superior value to alienage.

Not only were citizens influenced and driven to renounce by the pressure of the need for refuge, but they were similarly driven, in so far as they belonged to families with alien members, by the fact that they had to renounce in order to assure keeping their families intact. This concern, which was also an ever-present factor in the evacuation and detention program, likewise reached a new climax because of the announcement respecting return to the West Coast and the closing of the camps (*Id., supra,* p. 18). Another major pressure in the mass renunciation period in the Tule Lake Camp was the intensification of the demonstrations and threats, and attempts to increase hysteria and confusion, by the pro-renunciation organizations, which were permitted, and in fact had been helped, by the Government to assume a dominating place in the Tule Lake community (*Id., supra,* p. 22). Finally, by its abrogation of the program of maintaining the Tule Lake Camp and its demonstration thereby of inconsistency and vacillation to an even greater degree than previously in the program, and by its toleration of violence in and out of the camp, the Government gave intensified grounds during this period for distrust of its intentions with regard to citizens of the Japanese race.

Despite the recognition of the pressure exerted by these circumstances towards renunciation, the Attorney General's representatives pushed on with the renunciation and alien internment program, and the WRA officials pushed

on with the program of closing the camps, with neither agency yielding to the suggestion of the other to cancel its program [R. 136-142, 127-130, 248-250, 266-268, 259-260]. The high degree of bureaucratic fumbling and jealousy, obvious from the record, is of no concern here except that it makes comprehensible what might otherwise seem incredible: that is, that Government officials stood by while the ctizens were caught in the trap of these governmental programs and as a result impelled towards renunciation, although the facts as to the impelling pressures were as clear at the time of renunciation as they are uncontroverted today.

3. Effect of Circumstances Upon Free Choice.

We believe it is clear that a renunciation made under these circumstances did not represent a free and reasoned choice as to citizenship. Even more than the evacuation and detention alone (*supra,* Point B), the accumulation of circumstances during the mass renunciation period would be likely to influence and overwhelm the ability to retain an appreciation of American citizenship with its normal prerequisite. For, while the citizen's right to demand protection from him Government is generally an essential prerequisite of citizenship, here the needed protection was to be secured only by renouncing citizenship. A choice to renounce under these circumstances could not be deemed to be made with a clear appreciation of the right relinquished, and thus, was not a free and voluntary choice. (See cases cited *supra,* notes 18 and 19.)

Further, it is to be borne in mind that the circumstances prevailing during the mass renunciation period not only had a negating effect with respect to appreciation of the right relinquished but also exerted affirmative pressures

toward renunciation. In that the need to keep families intact was an influence towards renunciation, the instant case is again analogous to *Von Moltke v. Gillies,* cited *supra,* Note 20, where the Justices stressed, in invalidating a plea of guilty, that one of the defendant's chief concerns in determining whether or not to plead guilty was her husband's job and her child's care (332 U. S. at 717). We believe that the concern with family unity prevailing during the mass renunciation period is as foreign to the considerations which should properly influence a choice to renounce as were Von Moltke's family worries to those circumstances which should properly influence a plea of guilty.

But renunciation was not only expedient from the standpoint of assuring family unity, but also from the standpoint of assuring protection from violence and hardship both in and out of the Camp. Thus the situation was also highly analogous to that found in many of the cases in which confessions have been invalidated, where the confession has been attributable to the human tendency to escape from immediate pressures, dangers and hardship, by sacrificing rights which are not immediately involved. (See Justice Jackson dissenting, in *Ashcraft v. Tennessee,* 322 U. S. at p. 173.) But it is almost supererogatory to say that in order for the confession to be invalidated the peril which the confessor seeks to escape need not be that of an immediate physical blow; the Court is concerned with "unlawful *pressures,*" equally with "force or threats." See *Lyons v. Oklahoma,* 322 U. S. 596, 602. Indeed, because a conflict of evidence with respect to actual physical coercion is usual in confession cases (see *Ashcraft v. Tennessee,* 322 U. S. at pp. 152-158), this element is rarely considered by the Court. In-

stead, the influence invalidating the confession is generally more subtle and pervasive in the sense that it is the atmosphere of apprehension and helplessness which the Court stresses. Thus, in the *Ashcraft* case, the Court invalidated the confession on the basis of the effect on the nerves of the uncontroverted circumstances (at p. 154). And, in *Chambers v. Florida,* 309 U. S. 227, the Court noted that the evidence as to the use of violence was conflicting (at p. 238). But after pointing out the circumstances of the defendants' arrest and confinement which would tend to make them feel hopelessly and helplessly disadvantaged, the Court held the confessions invalid because "the very circumstances surrounding their confinement and questioning . . . were such as to fill petitioners with terror and frightful misgivings" (at p. 239); because they were throughout the proceedings "never . . . wholly removed from the constant observation, influence, custody and control of those whose persistent pressure brought about the . . . confessions" (at p. 235); and because "the haunting fear of mob violence was around them in an atmosphere charged with excitement and public indignation" (at p. 240). See also *Powell v. Alabama,* 287 U. S. 45, 51, where the Court pointed out that a need for special protection of the defendants' right to counsel arose because the "proceedings from beginning to end took place in an atmosphere of tense, hostile and excited public sentiment. During the entire time, the defendants were closely confined or were under military guard." And in *Malinski v. New York,* 324 U. S. 401, the element emphasized by the Court in invalidating the confession was the defendant's feeling of helplessness as against the law-enforcement officials questioning him, arising in large part from the fact that he was isolated except for seeing one friend (at

p. 405). As to the element of isolation, see also the *Von Moltke* case, 332 U. S. at 711, 713, 721; *Powell v. Alabama,* 287 U. S. 45, 71.

Thus, it is clear that in our emphasis upon the fact that a free choice could not exist not only because of the specific pressures towards renunciation but because of the atmosphere at the time of the renunciations of apprehension, bewilderment, and hysteria, we are supported by firmly established legal doctrine. And the crescendo of public hostility which was reached at that time is of extreme importance, not only in that it specifically influenced the citizens towards renunciation as an escape therefrom, but also because of its general effect on the tension, and apprehension, and thus on the ability to reason and appraise of these citizens.[53] We submit that a relinquishment of citizenship under the influence of the circumstances prevailing during the mass renunciation period cannot be deemed to be a "reasoned and voluntary choice,"[54] for there was not "both the capacity to make an understanding choice and an absence of subverting factors so that the choice is clearly free and responsible."[55]

It seems clear that the factors we have stressed must be deemed subverting, for the need to find refuge from racial violence and similar needs could hardly be viewed as appropriate influences upon the choice to retain or renounce citizenship. The influences during the mass re-

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[53]In addition to the excerpts quoted *supra,* as to public hostility, see *Powell v. Alabama,* 287 U. S. at 71; *Von Moltke v. Gillies,* 332 U. S. at 721.

[54]*Lee v. Mississippi,* 332 U. S. 740.

[55]*Von Moltke v. Gillies,* 332 U. S. 708, 729 (separate opinion by Justice Frankfurter.)

nunciation period are somewhat analogous to those deemed to render renunciations invalid in the *Doreau* and *Schioler* cases. In the *Doreau* case (cited *supra,* p. 25), an American citizen, thus renouncing her American citizenship, because she wished to avoid the internment to which she would probably have been subjected if she had remained an American citizen; her desire to avoid internment was accentuated by her pregnancy and illness. The Court held that a determination to renounce citizenship impelled by reasons such as those alleged by *Doreau* must be deemed to have been made under "duress" and the act of renunciation to be "involuntary" and invalid. Similarly, a relinquishment of United States citizenship for reasons of wartime expediency was held to be involuntary and invalid in *Schioler v. United States,* 75 Fed. Supp. 353 (N. D. E. D. Ill., 1948), which was cited with approval in the *Doreau* case. There the petitioner was a woman American citizen who was in Denmark with her husband and children during the period of German control; she renounced her American citizenship in favor of Danish citizenship because she believed this change of citizenship would afford her some protection against the Germans. While the only showing of any specific threat of danger to her from the Germans was the allegation that "the Germans were after students and their two children were of student age" (75 Fed. Supp. at 355), the court held that "everything done by petitioner was done under the compulsion of fear for the safety of herself, her husband and their children, and in the interest of preserving their very lives," and that her renunciation was not therefore "the free and voluntary renunciation . . . which . . . the statute contemplates" (75 Fed. Supp. at p. 355). However, as indicated above (*supra,* p. 46), we believe

the instant case an *a fortiori* case in the light of *Doreau* and *Schioler,* for the pressures here were as, or more, crucial, and further were largely due to this Government's own conduct and were basically referrable to its program of racial discrimination.

4. Invalidity as a Matter of Law of All Renunciations During Mass Renunciation Period.

Regarding it as incontrovertible that a renunciation which was substantially influenced by the circumstances above discussed was involuntary and invalid, we shall now consider the point that all renunciations made under such circumstances—that is, all renunciations during the mass renunciation period—should be held invalid as a matter of law.

The strong probability that all of the citizens renouncing during the mass renunciation period were influenced to do so by some or all of these subverting circumstances seems to us to be incontrovertible. For there circumstances were "inherently coercive"[56] in the sense that they were of such impelling force towards renunciation that any renunciant is highly likely to have been influenced thereby. Further, all authorities and affiants agree that these circumstances influenced the renunciants; for while appellants maintain that some citizens were predisposed to renounce because of their intention of going to Japan (discussed in greater detail, *infra,* p. 60), even as to them, it is not denied that the need for refuge arising from the camp-closing announcement precipitated their decision to renounce [see R. 136-7]. Finally, we believe that the

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[56]See *Ashcraft v. Tennessee,* 322 U. S. at 154.

inference of *"post hoc, propter hoc"* here irrefutably establishes that the coercive circumstances of the mass renunciation period influenced the mass renunciants. For these citizens did not resort to renunciation during the four or five month interval between the enactment of the statute and this period. And the only changes of circumstances which occurred at the time that these thousands of citizens took the step of renunciation were those that have been here outlined and that, as we have shown, cannot be permitted to influence the choice to retain or renounce citizenship.

The appellants' position on the influence of these circumstances is not comprehensible; appellants do not deny the existence of the subverting circumstances, as indeed they cannot in view of the record, yet they apparently would have the Court discount the effectiveness of such influences on the basis of various statistical deductions. All of appellants' propositions are unconvincing, and certainly lack sufficient persuasiveness to contradict the fact, established both by evidence and inference, that the coercive circumstances were decisively influential.

As to the fact that only a great majority, and not all of the Tule Lake resident, renounced (App. Br. p. 54), the record indicates some of the individual characteristics which caused individuals to be less influenced than the average by the prevailing circumstances. Some citizens were more defiant with respect to internal pressures because they were themselves of the "strong-arm" type [R. 85-86] and some were in closer and more confidential con-

tact with WRA officials [R. 235, cf. R. 219]. Thus there is no warrant for inferring from the fact that not all citizens were driven to renounce, either that the subverting circumstances did not influence those who did renounce or that the non-renouncing minority possessed some superior intrinsic loyalty to the United States.

Again, the appellants attempt to indicate that the coercive influences were not significant by commenting that a greater per cent of the citizens at Tule Lake who arrived there as a result of segregation renounced than those who had been there all along (App. Br. p. 54). Appellants have omitted to mention various differences in the background of these two groups which would account for a difference in the extent of their reaction to the subverting circumstances and would make these figures entirely explicable. In the first place, the urge for a place of refuge had been a prominent feature of the segregation (Statement of Facts, *supra,* p. 20), and it is not surprising that many of those who had once strongly felt this need should react more keenly than others when it again became a crucial issue. The New Tuleans may also have felt the need for refuge more strongly because they had experienced an additional uprooting as compared to the Old Tuleans and because the latter had been favored in many respects by the WRA camp administration [T & N 108-111]. We do not maintain that these factors are the only explanations of the figures, for a definitive analysis would require a detailed correlation of various data; but we do maintain that nothing can be proved one way or

the other as to the influence of the subverting circumstances by an offhand reference to such percentage data.

As to the influence on the renunciants of violence within the camp, appellants seem to regard very lightly the assaults in October and November, 1944, reported by one of their affiants [R. 58, 60-61, 85-86; *cf.* App. Br. p. 55]. And in considering the Hitomi murder the appellants ignore the fact that renunciation was made a primary aim of the anti-administration groups, which is the obvious reason that this murder was generally deemed by affiants to have been a strong influence towards renunciation [R. 257, 261, 289]. In appellants' attempt to discount the threatening atmosphere in Tule Lake on the basis that there was not a continuous series of such murders and assaults (App. Br. pp. 55-56), the appellants overlook the apprehension created by even one such incident where the assailant is not apprehended and no steps whatsoever are taken to deter or apprehend further such assailants [See R. 267-268, 256]. The appellants' suggestion that the renunciant could have avoided this threatening atmosphere by going to a relocation camp ignores the other pressure to which the renunciants were subjected; *i.e.,* the need to avoid relocation because of the violence and hardships outside the camps.

In sum, nothing appellants have said detracts from the fact that it is highly probable that all renunciations during the mass renunciation period were decisively influenced by the coercive circumstances then prevailing which must be deemed to have been subversive or a free choice.

Thus, the reasoning which supported the conclusion that renunciations made under the influence of detention should be deemed invalid as a matter of law (*supra,* Point IB), even more strongly supports the conclusion that renunciations made under the conglomeration of subverting circumstances existing during the mass renunciation period should be so deemed. If this Court does not establish such invalidity as a matter of law, and if it instead permits any renunciation to be held binding on an individual basis, the Court will be countenancing the use of renunciations which are likely to have been influenced not only by the gross racial discrimination of the evacuation and detention, but also by violent racial hostility, by governmental failure to protect against violence both inside and outside the Camp, by governmental confusion and ineptitude, and by the Government's depreciation of the value of citizenship through its apparent extension of greater protection to aliens than to its own citizens. Not only is there no proof which could eliminate the likelihood that any of the mass renunciants were so influenced, as we pointed out in relation to the influence of detention (*supra,* p. 35), but also the likelihood of error in estimating the substantiality of these influences upon a renunciant is even greater than in the case of detention alone, because of the involvement of additional highly subjective factors. And the shocking unfairness of this Government's exploiting a sacrifice of citizenship to which a citizen was driven by the circumstances of the mass renunciation period, immeasurably increases the importance of judicial disapproval of governmental pursuit of the renunciation program during that period (*Cf.* pp. 39-40, *supra*).

D.

Invalidity of Appellants' Renunciations Individually Considered.

But even if this Court does not adopt either of the rules of law we have urged, and if the renunciations are to be considered on an individual basis, appellees have fully proved their cases. In the first place, there is nothing which appellants have adduced or argued which contradicts the reasonable presumption that appellees were influenced by the coercive circumstances prevailing during the mass renunciation period.[57] And even without relying on this presumption, it is clear that appellees have presented convincing and uncontradicted evidence that they were so influenced.

Two of the appellees were peculiarly subject to the threatening atmosphere of the Tule Lake Camp because they lived in a block and ward where the most rabid anti-administration leaders lived [R. 5, 6, 315, 317]. All four of the renunciants were peculiarly subject to the pressure for renunciation arising from the need for a place of refuge and the desire for family unity. The three women renunciants were married to alien husbands who were not only subject to, but likely to be, kept in internment. Each

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[57]Judge Goodman's conclusion in the *Abo* case was that these circumstances created a rebuttable presumption that the renunciations was involuntary. Such a presumption of fact, as "a process of reasoning from one fact to another" (see *Maggio v. Zeitz,* 333 U. S. 56, 66), is dictated by reason and logic; furthermore, reasonable presumptions favoring the renunciants are to be indulged because, as pointed out *supra,* p. 42, the renunciations affect their basic Constitutional rights. Compare *United States v. Congress of Industrial Organizations,* 335 U. S. 106, 121-122, respecting the shift of the burden of proof as to the validity of a statute when democratic freedoms are affected thereby; and *Von Moltke v. Gillies,* cited *supra* (at note 20), as to the presumption against the waiver of Constitutional rights.

had three young children, and no outside resources or support other than that of their husbands. They and their young children could not be assured of remaining united with the husband and father unless they renounced, and continued their internment. The record is replete with evidence of their concern for their children and for the unity of their families [R. 5, 8, 152, 156, 162, 165, 167, 197, 203, 204, 315, 316, 318-319]. We believe that where, as in the case of the three women appellees, a citizen has been subjected to expulsion from her home on a racial basis and the loss of all material resources, and, in an atmosphere of violence and tension, is confronted with the choice between renouncing citizenship or breaking up her family and braving race violence and destitution with three small children, such a citizen's renunciation is not based on the free and deliberate choice the statute contemplates. The cases of the women-renunciants are, from this standpoint, closely similar to the *Doreau* and *Schioler* cases, discussed *supra*.

As to Inouye, it is clear and uncontroverted that he was influenced to renounce by the fact that he was a minor and an only son, and could continue his internment with his alien parents only by renouncing and that he was pressured to renounce by his parents [R. 4, 180, 184, 185, 188, 192]. We submit that where, as in Inouye's case, a citizen is expelled from his home and community at the age of 15 in a program of racial discrimination and then at the age of 18 is confronted with the choice of returning to that community alone or renouncing his citizenship and maintaining his family ties, such citizen's renunciation is not based on the free choice contemplated by the statute.

In their argument that the renunciations were voluntary, appellants point to the fact that the renunciation proceed-

ings were time-consuming (App. Br. 40). But this obviously is irrelevant to the issue of whether appellees were influenced by the coercive circumstances here in question, since for all of them, the need to renounce in order to obtain refuge and family security, prevailed during the entire period of their renunciations. While the drawn-out procedure might have served its intended purpose of minimizing the type of coercion and mistake of which the Department of Justice was willing to take cognizance, it did not minimize the type which actually existed.

Likewise fallacious is the appellants' emphasis on the statements made at the so-called renunciation hearings. As in any case involving the question of whether a relinquishment of rights is voluntary, the renunciant's statement of reasons therefor must be carefully probed. For the person who has concluded to relinquish a right customarily makes those statements as to motivation which are necessary to accomplish the decision to relinquish, regardless of whether that decision is in fact a product of those motives and of free choice; accordingly his statement of reasons is to be greatly discounted. See for example *Haley v. Ohio,* 332 U. S. at page 601, and *Von Moltke v. Gillies,* 332 U. S. at pages 717, 724, where the Supreme Court accorded no weight to the statements, respectively, that the confession was not made under duress, and that a plea of guilty and a waiver of counsel were understandingly and freely made. Furthermore, appellants' affiant himself describes the conspicuous attempts by renunciants to make whatever statements seemed suitable to accomplish the renunciation [R. 123-4]. A statement of an intention to go to Japan, such as was expressed by these appellees, was a usual feature of the mass renunciation hearings, since it was considered a suitable statement in

order to secure approval of the renunciation; and appellees' statements of such intention in no way renders their cases different from or shows that they were less influenced by the subverting circumstances than, the thousands of other renunciants. And the appellees' hearings themselves demonstrate their attempt to make appropriate statements of motive, whether or not true, as well as the general superficiality of the hearing procedure.[58] Indeed, we believe the record shows that these hearings were so perfunctory and superficial that they would not even have been sufficient to ascertain the existence of the only type of coercion with which the hearing officers were to be concerned, *i. e.*, the threat that the renunciant would be immediately physically assaulted by another camp inmate [R. 114]; in any event the hearings were not directed at, and thus they obviously did not reveal, the other kinds of pressures which we contend were influencing the renunciants.

Thus, assuming the truth of appellees' statements at their hearings that they intended to go to Japan, the fact that this was the only pressure towards renunciation which they stated creates no inconsistency in their cases. For with the utmost credit to the statements at these hearings, it can not be supposed that the appellees would have there stated the other factors influencing them to renounce which they have alleged and proved. Obviously, the wom-

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[58]Thus, Shimizu stated that her mother and father lived in Japan [R. 197], apparently feeling that this answer was expected of a renunciant, though they were in fact in the United States [R. 201, 202]; Murakami similarly first stated that her mother intended to stay in the United States [R. 162] but then announced that her mother wished to go to Japan [R. 162]; Sumi had an inexplicable sudden desire to be with her aged father in Japan [R. 152]; and in Inouye's case his indication that he in fact did not wish to remain with his parents, but was being pressured by them to do so [R. 180] was not investigated at all.

en-appellees' need to renounce in order to have a place of refuge for themselves and their children, together with their husbands, would not have been voiced; for it was true at the time of renunciation as throughout the program, that it was necessary in order to secure a place of refuge to conceal this need and instead to express the sentiments establishing a need for detention according to the Government's standards. And certainly the fear of violence would not have been voiced for this would have invalidated the renunciation, which the appellees had decided they needed to obtain, as well perhaps as provoked retaliation.[59]

1. Lack of Free Choice With Respect to Deportation.

Assuming a decision to go to Japan was one of the motives for renunciation, such a decision was no more a product of free choice than was the renunciation itself. The appellants have stopped short in tracing the determination to renounce to its sources in that they have failed to consider the basis of the purported intention to go to Japan; an intention to go to Japan was, equally with the renunciation itself, a product of race discrimination, detention, and the other influences which invalidate the renunciation.

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[59]Such a fear of retaliation would exist in the atmosphere of apprehension in Tule Lake without direct proof that the pro-renunciation leaders could determine whether persons renounced (App. Br. 53); furthermore, in view of the dominating position of the organizations and their apparent access to Government Officials [see T & N 339], it would have been feared even aside from this atmosphere that these leaders could obtain such knowledge.

The *Doreau* case is illustrative of the insufficiency of appellants' method of analyzing the issues. There the determination to renounce was based upon a desire to secure the protection of French citizenship, a desire which would, without more, be a normal reason for renunciation rather than ground for a holding of duress; but this desire, and thus the resultant determination to renounce, did not represent a free choice because of the stresses and pressures which gave rise to it. Thus, while a choice to renounce American citizenship because the renunciant intends to live in Japan would, without more, be a free, valid, and binding choice, it is a coerced choice where the intention to so reside is in turn made under pressure and duress. In the instant case, the same elements as to the need for escape and refuge influenced renunciants to determine to go to Japan, as influenced them to seek internment as aliens (discussed *supra,* p. 44). Thus, in the case of the women-appellees, other than going to Japan with their husbands, the alternatives facing them at the time of renunciation were an indefinite term of years with their children in Tule Lake, perhaps ultimately followed by deportation, or a single-handed attempt to reestablish a life for themselves and their children without resources in a hostile community in the face of race violence.

It is clear from the record and there is no indication to the contrary, that the women appellees' intention of going to Japan arose as an escape from the alternatives we have described. And from the standpoint of assuring their unity with their husbands and going to Japan as a family,

renunciation was essential because the exchange arrangements did not apply to American citizens.[60]

On any view of the case we can see no need for, or useful purpose in, a remand for further evidence as suggested by appellants (App. Br. 59). After moving for summary judgment, presumably on the basis of all the evidence it had available, appellants now wish to avoid the possibility of affirmance of the judgment against them by re-commencing the entire litigation. They attempt to make this procedure palatable by striving to impose on appellees the wholly unreasonable and impossible burden of refuting every supposition as to their motives for renunciation which appellants can conceive. We believe that appellees have affirmatively and convincingly established

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[60]The hearing officer's cavalier statement that there was no connection between renunciation and deportation [R. 162; App. Br. 48] reflects the inattention that was paid to the plight of the women renunciants and to their need to renounce in order to remain with their husbands.

If, in addition, any of the appellees believed they'd be better off in Japan without American citizenship (App. Br. 59), this does not affect the invalidity of their renunciations, for such invalidity results, we submit, because of the pressures which influenced them, in the first place, to determine to go to Japan. The same answer applies to the appellants' argument that they may have been influenced by a belief in Japanese victory (App. Br. 59); the important question is how and why they were first influenced to turn away from the United States and to Japan for their future. There is not, however, any indication in the record that they had any such belief, and there is instead entirely credible proof, as described in the text, of their motives for deciding to go to Japan. As to the fact that they did not attempt to retract their renunciations until after the Japanese defeat (App. Br. 41, 50), it is to be noted that two and three months respectively elapsed before two of the appellees made such attempts [R. 165, 201], thus indicating that factors other than the defeat motivated their efforts. "Furthermore, the need for a place of refuge, which was of prime importance in motivating the renunciations, was not alleviated until the end of the war. See R. 137, with respect to attempts by all center residents to have the centers maintained until the end of the war."

by a preponderance of evidence the fact that their renunciations were due to influences that deprived them of a free choice; that in the face of this proof appellants' suppositions cannot stand; and that even those suppositions if logically analyzed, would not establish appellees' free choice. Appellants' various attempts to undermine appellees' cases by showing "inconsistencies" in the pleadings or proof are equally unconvincing[61] and give no indication that appellants could in any way overcome the preponderance of the evidence in appellees' favor, in the event of a remand. Furthermore, appellants do not, even in their request for a remand, indicate clearly what facts could be established thereby and what relevance such facts would have to the question of whether appellees renounced voluntarily, under any proper conception of this term. The remand would accomplish nothing but a prolongation of the proceedings.

E.

Conclusion as to Invalidity of the Renunciations.

We urge upon this Court the importance of invalidating the renunciations because of its high duty to prevent the denial of racial equality whether it is done expressly or merely "in substance and effect."[62] Besides the fact

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[61]We do not grasp the point of appellants' statement that its quoted part of Sumi's affidavit is the only evidence introduced as to her renunciation (App. Br. 45); they ignore, perhaps again because of a refusal to take cognizance of the basis for these cases, the uncontradicted allegation and proof that Sumi was affected by all the pressures which affected the renunciants generally, and in particular by the need for refuge and family unity. As to Murakami, we do not perceive any inconsistency in her position that her renunciation was influenced both by mistake and coercion (App. Br. 48).

[62]*Oyama v. State of California,* 332 U. S. 633, 636.

which we have already emphasized, that a validation of the renunciations would perpetuate racial discrimination because of the latter's influence in producing the renunciations, it should also be pointed out that discrimination permeated the whole renunciation program in other respects. The statute itself was devised as a special procedure to continue the incarceration of citizens of the Japanese race, in large part because of public prejudice against them (*supra*, p. 17) though, even the bravado and defiance of some members of the race could not be deemed to show they were potentially more dangerous than quieter but more insidious and effective citizens of other races. And the very fact that the mass renunciants even had knowledge of the renunciation statute was due to their racial detention.[63] Further, no citizens of other races were subjected to the burdens imposed on the Japanese, and then "offered" renunciation; and it must be assumed, unless a racist view is adopted, that members of other races, at least those of enemy ancestry would have reacted similarly. It is because of this discriminatory background that, as an aftermath of the war, the only group of native-born citizens who may be left deprived of the benefits of their birthright of citizenship are those of the Japanese race. Thus, a validation of the renunciations would stand as a perpetuation of the entire discriminatory pattern, which was initiated, and its initiation permitted, only as a wartime emergency; and which,

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[63]Thus, the fact that some citizens of the Japanese race requested renunciation (App. Br. Note 77) does not alter the fact that the general announcement to the camp, instead of attention to the individual requests, was due to the treatment of all citizens of this race as a mass, and due to insufficient care to restrict the program to that intended by Congress.

in many features has never been held constitutional and seems the complete antithesis of constitutional principles. This Court has a particular duty of vigilance to protect members of racial minorities, who cannot rely on their political strength for protection, against being pressured to relinquish their rights in times of racial hostility.[64]

And it is to be borne in mind that not only is there no present emergency that might justify this discriminatory deprivation of citizenship, but that even at the time of the program there was not even the semblance of the "compelling justification" necessary to sustain a racial discrimination,[65] as far as the mass renunciants were concerned. Instead, the statute was to serve as a temporary legal device for circumventing constitutional safeguards with respect to a small group of citizens. Thus, there is no justification for depriving appellees of their American citizenship, which when given its normal position, "by many . . . is regarded as the highest hope of civilized man,"[66] and exposing them to all the detriments of the status of alienage, including summary deportation.[67]

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[64]See *Chambers v. Florida,* 309 U. S. 227, at p. 241, where the Court said: ". . . Courts stand . . . as havens of refuge for those who might otherwise suffer because they are helpless, weak, out-numbered, or because they are . . . victims of prejudice and public excitement" and at p. 236 where the Court remarked on the use as "scapegoats of the weak, or of helpless political, religious or racial minorities. . . ."

[65]*Oyama v. State of California, loc. cit. supra,* note 62.

[66]*Schneiderman v. United States,* 320 U. S. 118, 122.

[67]See R. 102 as to the Department of Justice's view that Japanese nationality could be imputed to renunciants, and *Ludecke v. Watkins,* 335 U. S. 160, as to the still-existent power of the Attorney General to deport summarily enemy aliens.

II.

The District Court Had Jurisdiction in Case No. 11839 (Appellants' Point I).

A quick and decisive answer to appellants' claim that the record in No. 11839 is barren of any showing that the appellants denied appellees any right or privilege as nationals of the United States (App. Br. 32) is that that fact was admitted and therefore proved by the pleadings.

In the amended complaint, paragraph III [R. 3], appellees allege the ultimate fact that "the defendants . . . have denied the plaintiffs rights and privileges as nationals of the United States."

In their answer, paragraph III [R. 17] appellants pleaded:

> "Defendants . . . Deny that plaintiffs are nationals of the United States and admit all the remaining allegations of Paragraph III of the said complaint."

It is now too settled for argument that facts admitted need not be proved. Indeed were the rule any other way, there would be little use for responsive pleadings.

The rule was long ago set forth by Chief Justice Marshall in *Alexander v. Harris,* 4 Cranch (U. S.) 299, 303:

> "The issue gives notice to the parties of the point which is to be tried, and which the testimony must support. That which is admitted by the pleadings need not be proved."

And that rule has never been departed from. See:

M'Niel v. Holbrook, 12 Pet. (U. S.) 84;

Rolls County v. Douglass, 105 U. S. 728;

The Southern Express Co. v. The Western North Carolina R. R. Co., 105 U. S. 191;

Deputron v. Young, 134 U. S. 241, 250, 251;

Swift & Co. v. United States, 276 U. S. 311, 329.

Rule 8(d), Federal Rules of Civil Procedure, carries out this rule by providing that a fact not denied is deemed admitted. And when it is considered that the principle is so strong that "a finding which contradicts a fact admitted in the pleadings, is to be disregarded (*M'Ferran v. Taylor and Massie,* 3 Cranch (U. S.) 269, 280), appellants cannot now be heard to say that the admission was "inadvertant" (App. Br. 24, note 43).

The purpose of pleadings is to give the parties notice of what they will be expected to prove. It is a salutory rule designed to eliminate unessentials at a trial. Litigation would never be at an end if a plaintiff can be lulled into the impression that he has proved an element of his case and then be told that though defendant admitted that element, plaintiff must nevertheless prove it.

Nor was the fact as to whether appellants had denied appellees rights and privileges of nationals of the United States even "inferentially" posed by the pleadings (App. Br. 34). As stated by appellants in paragraph IV of their answer [R. 17, 18], appellees' allegation of jurisdiction in paragraph III of the amended complaint [R. 3] is a conclusion of law. And though it is customary for purposes of clarity in pleadings in the District Court to set forth the specific section under which the plaintiff claims the court has jurisdiction, jurisdiction is not determined from that allegation but from the facts alleged and, if necessary, proved. (*Cf. Gibbs v. Crandall,* 120 U. S. 105.)

The facts required by 8 U. S. C. 903 having been alleged in the complaint and those specific facts having been proved by the specific admission in the answer, the jurisdiction of the Court is established.[68] (*Gibbs v. Buck,* 307 U. S. 66, 72.)

There is however a greater reason, other than the technical one argued above and which, without question, binds the appellants. Appellants' argument that the Attorney General has done nothing to deny appellees any right or privilege as nationals takes out of 8 U. S. C. 903 much of its ameliorating and beneficient effect. The argument that appellants cannot restore appellees' citizenship (App. Br. 36), and therefore that they have nothing to do with this case, is beside the point. The statute merely requires that appellees be denied a right or privilege as nationals; it does not require that citizenship be restored by the department agency or executive official so denying.

The Attorney General denied appellees' right as a national when he illegally exercised the discretion given him under 8 U. S. C. 801(i) and approved the renunciation. This was a positive act of denial, citizenship being one way of being a national (8 U. S. C. 501(b)). By this positive act of illegally permitting appellees' citizenship to be taken away, appellants denied appellees a right as nationals. This is a continuing act on the part of appellants and satisfies the requirement of 8 U. S. C. 903. That section, "being remedial . . . is entitled to a liberal construction." (*Attorney General v. Ricketts,* 165 F. 2d 193, 195 (C. C. A. 9, 1947).)

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[68]Accordingly appellants' discussion about conferring jurisdiction by consent (App. Br. 34, note 43) is inapposite in these proceedings.

It is not reasonable that the statute be given the interpretation sought by appellants. The specter of having stateless persons wandering around the country [*Cf.* R. 193] uncertain as to their status and wondering as to their rights was precisely what was sought to be laid at rest by the statute. Appellees having been denied a right as nationals by appellees, they are entitled to a declaration under 8 U. S. C. 903 as to whether they are or are not citizens.

This is not the first time that appellants' argument to so strictly circumscribe the section has been made. In *Chin Wing Dong v. Clark,* 76 Fed. Supp. 648 (D. C., W. D., Wash. 1948), the same argument was made and rejected. Said the Court at page 652:

> "I am mindful that in effect the Department merely argues against granting him the affirmative relief of decree of citizenship and that there has been no effort nor intention of deportation. In other words it is implied that the petitioner may live here, exercise the rights of citizenship, and even vote, but that the court should deny him a decree that he is the citizen that in fact he is. To require him to continue in the legal twilight of such uncertainty is neither fair to him nor worthy of this government . . .
>
> "Therefore, it is only right that the citizenship he has repeatedly established be confirmed by appropriate decree under 8 U. S. C. A. 903 aforesaid."

And so here.[69]

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[69]The question of whether the general declaratory judgment statute is applicable here is, as pointed out in *Brassert v. Biddle,* 148 F. 2d 134, 136 (C. C. A. 2d, 1945), unimportant. Both that case and *Ginn v. Biddle,* 60 Fed. Supp. 530 (D. C. E. D. Pa., 1945), recognized that even after the passage of 8 U. S. C. 903, the Declaratory Judgment Act (28 U. S. C. 400) could serve as a basis

III.

The Renunciation of Albert Inouye (Appellants' Point III).

Appellees have made clear their views that individual proof in each case is not required. (Points IB and IC.)

However, if such individual proof be required, there is ample proof in the record to support Judge Cavanah's holding [R. 333-334] that "the youth (Inouye) yielded to parental compulsion and a clear case of 'parental influence' in order to hold the family intact," and that [R. 336] "the results flowing from that parental domination and the acts of fear constitute undue influence, duress and coercion require them to be declared null and void" and his finding [R. 366] that her renunciation was due to "undue influence and parental coercion" [see R. 179, 180, 182-185, 187, 191, 342-348]. Even appellants' own evidence supports the finding [R. 171, 172].[70] The findings, therefore, "are not clearly erroneous" and this court will accordingly affirm. (*Attorney General v. Ricketts,* 165 F. 2d 193, 195

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for determination just as it did prior thereto in *Perkins v. Elg,* 307 U. S. 325.

And appellants' objection *re* appellant Carmichael, if valid at all, is raised too late. If appellants objected to the presence of Carmichael in the case, they should have made objection to the Court's jurisdiction over his person by motion at the proper time. (*Ginn v. Biddle,* 60 Fed. Supp. 530, 531 (D. C. E. D. Pa., 1945); *Orange Theatre Corp. v. Rayherstz Amusement Corp.,* 139 F. 2d 871, 874 (C. C. A. 3rd, 1944), cert. den. 322 U. S. 740; *Branic v. Wheeling Steel Corp.,* 152 F. 2d 887, 888 (C. C. A. 3rd, 1945).)

[70]The hearing given Inouye in the Alien Internment Camp, Santa Fe, New Mexico, cannot be disconnected from the whole renunciation procedure [see R. 189, par. (5)]. And the finding by the Hearing Officer [R. 192] must be considered not merely as an opinion that Inouye renounced under parental influence but a clear finding to that effect [R. 172]. Under these circumstances, sufficient proof to support the allegation that the renunciation was not his free and voluntary act [R. 3, par. V] was adduced. And *cf. supra,* p. 57.

(C. C. A. 9, 1947).) But in any event, Inouye's purported renunciation was invalid because he was a minor under the age of 21 [R. 181, 182, 367].

Appellants' argument (App. Br. 61-71), viewed in its most favorable light, at best establishes but one thing; that there is perhaps an ambiguity in 8 U. S. C. 801 and 8 U. S. C. 803(b). Assuming, *arguendo,* that this is so, *Perkins v. Elg,* 307 U. S. 325, 337 directly controls the disposition of the case for it was there held that "rights of citizenship are not to be destroyed by an ambiguity." And *cf. Schneiderman v. United States,* 320 U. S. 118, 122, 125.

The action of Congress in quite clearly excepting from the provisions of 8 U. S. C. 803(b) all but subsections (b) to (g) *inclusive* of 8 U. S. C. 801 calls for the direct application of the maxim *expressio unius est exclusio alterius.*

No reported decision, other than that by the court below, has been found on the precise point. However, the decision of the Board of Immigration Appeals in the case of *Ismael Acosta Hernandez,* No. 56196/251,[71] is com-

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[71]This is the decision referred to by appellants at page 69, note 74 in their brief. The entire opinion of Appellant Clark, in reversing the decision of the Board of Immigration Appeals, and in which he administratively legislated, is as follows:

> "The decision and order of the Board of Immigration Appeals are reversed. I feel the Congress intended that the statute apply to persons under 21 who leave the United States for the purpose of evading or avoiding training and service in the land or naval forces. The view that the Congress failed to accomplish this purpose can, of course, be presented to the courts by the persons affected and I think under the circumstances a judicial determination of the question is desirable." (Decision of May 15, 1946.)

The instant case is an occasion for such a determination and to reject appellants' argument. Indeed the appellant himself in the above opinion, in effect, suggests the rejection of his point of view.

pletely apposite. That decision held squarely that a boy 19 years old (Inouye was 18 at the time he purported to renounce) [R. 181, 182] could not expatriate himself under the provisions of 8 U. S. C. 801(j) because he was not yet 21. The reasoning of that decision is equally applicable to subsection (i) as appellants themselves have recognized (App. Br. 68, 69). For the convenience of this Court that decision is set out in full herein as Appendix A.[72] Appellees submit that that decision is correct and should be applied by this Court in this case to subsection (i). *Cf. Attorney General v. Ricketts,* 165 F. 2d 193, 194 (C. C. A. 9, 1947).

Appellants' efforts to spell out some sort of a scheme that 18 years is *the* age of expatriation in the Nationality Act of 1940 (App. Br. 63) fall of their own weight. By pointing to the various sections wherein Congress did make 18 years the age (App. Br. 63, 64), and in one case gave certain rights up to 23 in view of *Perkins v. Elg* (App. Br. 67), they have emphasized that where Congress meant to change the common law rule of *Perkins v. Elg,* 307 U. S. 325, it specifically said so.

It is to be observed that the italicized portions of appellants' quotation from page 69 of *Codification of the*

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[72]Attached to the decision of the Board of Immigration Appeals, and reprinted here as a part of Appendix A, is a memorandum prepared by the Legal Adviser to the Department of State showing that the same reasoning is applicable to subdivision (a) of 8 U. S. C. 801. Appellants themselves argue that the same rule is applicable for subdivision (i) as for subdivision (a) (App. Br. 66-67).

Nationality Laws (House Committee Print, 76th Cong., 1st Session) (App. Br. 64) is pure *dictum,* if one may so characterize a committee report. The report was speaking of *this subsection,* namely subsection (b) of 8 U. S. C. 803. That subsection is specifically limited to subsections "(b) to (g) *inclusive,*" (Italics added) of 8 U. S. C. 801. And so also must the quotation from page 67 of Codification of the Nationality Code (App. Br. 65) be read in its context, namely with reference to "this provision"—8 U. S. C. 803(b).

Similarly the excerpt from Sen. Rep. 2150, 76th Cong., 3d Sess., p. 4 (App. Br. 65) speaks of "certain *specified* acts" of expatriation—not *all* acts of expatriation.

In the light of the strong and positive holding of *Perkins v. Elg,* 302 U. S. 307, 337 that "rights of citizenship are not to be destroyed by an ambiguity," the weakness of appellants' argument becomes apparent. Witness these words in their effort to arrive at Congressional intent: "speculate"; "possible"; "plausible" (App. Br. 66); "might have been deemed"; "might have obtained"; "speculations"; "possible" (App. Br. 67); "may have had good reason"; "inferable" (App. Br. 68). It is submitted that the precious right of citizenship (see *Schneiderman v. United States,* 320 U. S. 118, 122, 125) cannot be so nonchalantly and conjecturally obliterated.

The Nationality Act in 1940 in which *for certain specific acts* the age of expatriation was made 18, having been passed subsequently to the decision of *Perkins v. Elg,*

302 U. S. 307 (1939), the conclusion is inescapable that Congress intended the rule of that decision to apply where it had not changed it. Certainly speculation and surmise cannot serve to change that general rule and result in loss of citizenship for Inouye.

While administrative construction is entitled to great weight (App. Br. 70), where that construction is contrary to the terms of the statute, it will not be followed by the Court (See *Bay Ridge Operating Co. v. Aaron,* 334 U. S. 446.) Furthermore, it must not be forgotten that Inouye answered Question 28 in the affirmative and not in the negative [R. 192] and therefore does not come at all within the purview of 8 U. S. C. 801(i) or that section was never intended to cover those who had answered the loyalty question in the affirmative. (See App. Br. 70, and *supra,* Point I C.)

And finally, it is clear that rather than fly in the face of what appellants have called the "manifest" Congressional intent (App. Br. 70), the situation that one can renounce if outside this country at the age of 18 but cannot do so if inside this country is precisely what Congress intended. In the first place, Congress said so in 8 U. S. C. 803(b). In the second place, Congress was not unmindful of the existence of subsection (i). Thus at the same time it passed 8 U. S. C. 803(b) it also passed 8 U. S. C. 803(a). That latter subsection recognizes a distinction between 8 U. S. C. 801(f) for it there says that:

"Except as provided in subsections (g), (h), and (i) of section 401 (8 U. S. C. 801), no national can expatriate himself, or be expatriated, under this section *while within the United States* or any of its outlying possessions, but expatriation shall result from the performance within the United States or any of its outlying possessions of any of the acts or the fulfillment of any of the conditions specified in this section if and *when the national thereafter takes up a residence abroad.*" (Italics added.)

Here then, is specific recognition by Congress of a distinction between expatriation while within and expatriation while without the United States. It is to be noted that all of the subsections of 8 U. S. C. 801 except subsections (g), (h), and (i) refer to acts outside the United States.

For this Court to give the construction contended for by appellants would be to re-write the statute. This the Court will not do. As the Supreme Court has said: "It is not for (the Courts) to add to the legislation what Congress pretermitted." (*United States v. Monia,* 317 U. S. 424, 430.)[73]

The decision of the lower court as to the renunciation of Inouye is unquestionably correct.

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[73]And compare the action of the Michigan Supreme Court in *General Motors Corp. v. Michigan Unemp. Comp. Comm.,* November 12, 1948, digested at 22 L. R. R. 82.

Conclusion.

The judgments of the lower courts as to all appellees should be affirmed.

Respectfully submitted,

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APPENDIX A.

UNITED STATES DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS.

December 13, 1945.

56196/251—El Paso
IN RE: ISMAEL ACOSTA-HERNANDEZ
IN EXCLUSION PROCEEDINGS.

The Commissioner has found that the appellant, a nineteen-year-old native of the United States, lost his American citizenship under section 401(j) of the Nationality Act of 1940, as amended, and has recommended that the decision of the board of special inquiry excluding him on documentary grounds be affirmed. The case has been forwarded to us for review in accordance with 8 C. F. R. 90.3, the Commissioner in his transmitting memorandum requesting that the case be certified to the Attorney General for review in the event the Board did not see fit to follow his recommendation.

The pertinent facts in this case are set forth in the Commissioner's memorandum opinion and will not be repeated here. The sole issue presented by the record is whether a citizen of the United States can lose his American citizenship under section 401(j) of the Nationality Act of 1940, as amended, prior to attaining his twenty-first birthday. The Board in *Matter of Angule,* 56175/440 (August 3, 1945) answered this question in the negative and, for the reasons to follow, still adheres to that view.

Subsection (j) was added to section 401 of the Nationality Act of 1940 by section 1 of the Act approved

September 27, 1944 (58 Stat. 746). This subsection provides for the loss of nationality on the part of a citizen "departing from or remaining outside of the jurisdiction of the United States * * * for the purpose of evading or avoiding training and service in the land or naval forces of the United States." The amendatory legislation did not explicitly provide, either independently of the Nationality Act or by way of an amendment to that Act, any age limit below which expatriation could not be affected. So far as we have been able to ascertain, this matter was never specifically considered by the framers of the legislation, the pertinent congressional committees or by the Congress as a whole during the debates on the legislation.

This being so, Congressional history, and in particular quotations of general and broad statements made on the floor of the House and Senate (upon which statements the Commissioner largely relied in reaching his conclusion) can afford no concrete and accurate basis upon which the intent of Congress in this regard may be ascertained, especially, as will be shown below, when viewed in the light of the common law and the other subsections of section 401.

Prior to the enactment of the Nationality Act of 1940, expatriating statutes contained no express provision as to any age limit below which loss of citizenship could not result. But the common law, as is clear from many authoritative judicial decisions by both federal district and

state courts, did fix such an age limit at twenty-one.[1] The Supreme Court of the United States in *Perkins v. Elg,* 307 U. S. 325 (1939), recognized the existence of this rule when it said (p. 334): "To cause a loss of that citizenship (acquired through birth in the United States) in the absence of treaty of statute having that

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[1]For example, in *Ex parte Chin King,* 35 Fed. 354 (C. C. Oregon, 1888), the court said (p. 356): "This *status* (citizenship), once acquired, can only be lost or changed by the act of the party when arrived at majority * * *." Again in *U. S. ex rel. Baglivo v. Day,* 28 F. (2d) 44 (S. D. N. Y., 1928). it was said (p. 44), "A native-born citizen, who has not attained the age of twenty-one years, cannot renounce allegiance to the United States." The very same court had employed similar language in 1919 in *Ex parte Gilroy,* 257 Fed. 110, in saying (p. 119), "Until * * * realtor became twenty-one years of age, he was not competent to renounce his allegiance to the United States of America." To like effect was the statement in *McCampbell v. McCampbell,* 13 F. Supp. 847 (W. D. Ky., 1936), the court there saying (p. 849), "There are no exceptions to the rule that an infant lacks the power to renounce his allegiance to the United States." Like language was employed by courts of highest resort in the states of New York and Vermont in *Ludlam v. Ludlam,* 26 N. Y. 356, 376 (1863) and *State ex rel. Phelps v. Jackson,* 79 Vt. 504, 514, (1907), respectively. For additional authorities see *U. S. ex rel. Wrond v. Karnuth,* 14 F. Supp. 770 (W. D. N. Y., 1936); *In re Cordaro,* 246 Fed. 735 (N. D. Iowa, 1917); *In re Spitzer,* 160 Fed. 137 (C. C., Ill., 1908; *Nationality of Minors,* 14 B. U. L. R. 524, 536; *Involuntary Expatriation of Minor Children,* 7 Geo. Wash. L. R. 639, 645; *Citizenship and Expatriation of Minors Under Nationality Act of 1940,* 35 Ill. L. R. 607, 609, 610; 34 Col. L. R. 1366. *In re Carver,* 142 Fed. 623, 624 (C. C. Me., 1905), cited by the Commissioner in his memorandum as reflecting a contrary view, does not appear to be in point. The statement by the court that a less than eighteen year old army deserter might lose his rights to citizenship under sections 1996 and 1998 of the Revised Statutes upon conviction for desertion was *obiter dictum.* Moreover the statutes there concerned dealt, at least on their face, not with the loss of citizenship but loss of *rights* of citizenship. *Cf. Weedin v. Chin Bow,* 274 U. S. 657 (1927); *Shelley v. United States,* 120 F. (2d) 734 (Ct. App. D. C., 1941); *Matter of Paquette,* 56011/385 (approved by the Attorney General November 22, 1941).

effect, there must be voluntary action and such action cannot be attributed to an infant . . . who during minority is incapable of a binding choice."[2] The administrative view, except so far as concerned a minor's loss of citizenship through the naturalization of his parents in a foreign country[3] (subsequently reversed by the Supreme Court in the *Elg* case, *supra*), was in accord.[4]

When the Nationality Act was finally enacted by Congress and approved on October 14, 1940 by the President, section 403(b) read then as it reads now.

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[2]The Supreme Court in *United States v. Wong Kim Ark,* 169 U. S. 649 (1898) had suggested the existence of this principle when it said (p. 704), "No doubt he might himself, after coming of age, renounce this citizenship * * *. Whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful."

[3]See Report of the President's Committee on Codification of the Nationality Laws of the United States, 76th Cong., 1st Sess., House Committee Print, Part I, p. 66 for a recital of the administrative practice in this regard. As can be seen from this comment, the administrative officials, prior to the *Elg* decision, took the position that to preserve the principle of the singleness of allegiance of the family, a minor child took the citizenship of the parents. This discarded theory of the singleness of allegiance of the family unit might well explain the decision in the *Wittus* case, 47 F. (2d) 652 (D. Mich. 1931), in which it was held that a nineteen year old American woman lost her citizenship, under section 3 of the Act of March 2, 1907 by marriage, prior to 1922, to an alien. See also *Nationality of Minors, supra,* where it is said that at common law minor children and wives took the nationality of the father-husband. The *Elg* case made it clear that minor children did not *ipso facto* expatriate themselves by reason of the naturalization of their parents and a like principle logically would seem to apply to wives who married aliens during their minority.

[4]In its comments on the proposed second proviso to section 401 of the proposed Nationality Act (which became section 403(b) in the Act) the committee, consisting of representatives of the Departments of State, Labor, and Justice, said, "It will be observed that in this subsection the age below which a person cannot expatriate himself is set at 18 years, *instead of 21 years.*" Report of the President's Committee, *supra,* Part I, p. 69.

"No national under 18 years of age can expatriate himself under subsections (b) to (g), inclusive, of section 401."

Obviously the express provisions of section 403(b) with respect to the effective expatriating age had no application to either subsection (a) or (h)[5] of section 401. Congress could not then have intended that the eighteen-year-old age limit was to apply to these subsections, for presumably it would have said so in 403(b). It did specifically provide in the provisos to subsection (a) that twenty-three years was to be the age in the case of minors who acquired foreign nationality by reason of their parents' naturalization. It was silent, however, as to the first clause of subsection (a) dealing with those who obtained naturalization in a foreign state upon their own application and as to subsection (h). In adding subsections (i) and (j) to section 40, it also remained silent, nothing being said, as we indicated above, in the subsections themselves or by way of an appropriate amendment to section 403(b).

The fact that eighteen years could not have been the age limit intended by Congress to apply to the above-mentioned subsections does not mean, as the Commissioner suggests, that no age limit was intended, and that Congress meant that all minor citizens, regardless of their tender years, their immaturity and the degree of parental influence and pressure that might have been exercised over

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[5]The legislative history of the Nationality Act discloses that subsection (h) was added by the Senate after the Act was passed by the House without this subsection. The draft bill submitted by the President's Committee did not contain subsection (h) as it now reads. See House Reports 2396 and 3019, and Senate Report 2150 (76th Cong., 3d Sess.).

them, were to be subjected to the serious penalty contemplated by these provisions. It is axiomatic that statutes in derogation of the common law must be strictly construed. *Scharfeld v. Richardson,* 133 F. 2d 340, 341 (Ct. App. D. C., 1924); *West Va. Pulp & Paper Co. v. McElligott,* 40 Fed. Supp. 765, 771 (S. D., N. Y., 1941); *Ward v. White,* 97 F. 2d 646, 648 (Ct. App. D. C., 1938); cert. den. 304 U. S. 578; *Globe & Rutgers Ins. Co. v. Draper,* 66 F. 2d 985, 991 (C. C. A. 9, 1933). And where, as here, substantive rights are affected, a statute, and in particular a penal one, should not be extended by implication to include persons who do not come within its terms. *Ward v. White, supra; West Va. Pulp & Paper Co. v. McElligott, supra.*

To construe section 401(j) to apply to minors would, of course, be in derogation of the accepted common law principle in the United States that minors could not expatriate themselves, a principle of which the Congress must presumably have been aware. It would accordingly mean reading into the Nationality Act words which are not there and which we must assume Congress did not intend should be there. It would be a usurpation on our part of the legislative function, which under our constitutional system is reserved to the Congress.

Finally, the Commissioner's theory logically applied must mean that the other subsections of section 401 in which no specific age limit is set apply to all minors irrespective of age. Yet, under the Service's administrative

practice, with which we and the State Department[6] are in accord, it has been held that minors cannot effectively lose their citizenship under the first clause of section 401(a) by becoming naturalized in a foreign state on their own applications. In other words, this clause applies only to those who have attained their majority, and subsections (h)—(j) to all citizens regardless of age. Such illogical and inconsistent results where precisely the same statutory language is employed cannot with any degree of conviction be said to represent the true intent of Congress. The best that can be said is that the statute so far as concerns the issue before us is ambiguous. If this be true, the Supreme Court's admonition in *Perkins v. Elg, supra,* page 337, that the "rights of citizenship are not to be destroyed by an ambiguity" is applicable here and justifies our conclusion that section 401(j) has no application to minors.

We fully appreciate the force of the arguments advanced by the Commissioner in support of his contention, but to us it seems that these arguments are based not on what Congress did, but on what Congress ought to have done or would have done had the specific problem been brought to its attention. Whatever may be our own personal inclinations as to the desirability, from a policy point of view, of construing 401(j) to bring this appellant within

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[6]See attached copy of a memorandum, dated September 30, 1944, prepared in the office of the Legal Advisor to the Department of State. We have been authorized to say that this memorandum represents the views of that Department.

its scope, we do not feel that we are the proper agency to bring about such a result. That is a matter which is the sole concern of the Congress. Omissions in a statute should be supplied by the legislative arm of the government and not by administrative fiat.[7]

ORDER: The Commissioner's order affirming the excluding decision of the Board of special inquiry is reversed and the appellant is admitted as an American citizen.

/s/ THOS G. FINUCANE,
Chairman.

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[7]The Board in *Matter of Valas,* 56127/854 (November 11, 1943) was confronted with a similar problem involving the proper construction of sections 13(c) and 28(c) of the Immigration Act of 1924 in regard to the admissibility to the United States of a neutral alien who had claimed exemption from military service under the provisions of the Selective Training and Service Act of 1940, as amended. (A copy of our opinion together with the memoranda prepared for the assistance of the Attorney General is attached for ready reference.) Our holding in that case (approved by the Attorney General on February 24, 1944) was on all fours with our present decision that omissions in a statute are to be supplied by Congressional action and not by administrative construction. Congress did subsequently correct the defect in section 28(c) by the enactment of Public Law 205, 79th Congress; Chapter 437, 1st Sess., approved October 29, 1945.

September 30, 1944.

NATIONALITY STATUS OF PERSONS NATURALIZED ABROAD DURING THEIR MINORITY.*

Mr. Hackworth:

PD:

The attached cases raise the question of the capacity of a minor to expatriate himself under section 401(a) of the Nationality Act of 1940 by obtaining naturalization abroad "upon his own application."

In the Wong Kim Ark case, 169 U. S. 649, 704 (1898) it was stated that there was "no doubt" that Wong Kim Ark "might himself, after coming of age, renounce his citizenship" but that "whether any act of himself, or of his parents, during his minority, could have the same effect, is at least doubtful." In *Ex parte Chin King,* 35 Fed. 354, 356 (1888) it was said that the status of an American citizen acquired by birth in the United States "can only be lost or changed by the act of the party when arrived at majority."

In the case of *Ludlam v. Ludlam,* it has been held by a lower court that one Mr. Ludlam, born in the United States, had voluntarily expatriated himself by establishing a residence in Peru. The Court of Appeals of New York stated, however:

"When he left this country, and is found by the report to have 'expatriated himself,' he was but eighteen years of age, and therefore totally incapable of making any elec-

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*Memorandum prepared by the Legal Adviser to the Department of State referred to in note 6 of the decision of the Board of Immigration Appeals.

tion in regard to his citizenship." 84 Am. Dec. 193, 208 (1863).

In the case of *State ex rel. Phelps v. Jackson,* the Supreme Court of Vermont said that "during his minority Horatio Nelson was not competent to expatriate himself." 65 Atl. 657, 660 (1907). In the case of *Ex parte Gilroy* the District Court for the Southern District of New York said: "Until . . . relator becomes 21 years of age, he was not competent to renounce his allegiance to the United States of America." 257 Fed. 110, 119 (1919). In the case of *United States ex rel. Baglivo v. Day,* the same court said: "A native-born citizen, who has not attained the age of 21 years, cannot renounce allegiance to the United States." 28 F. (2d) 44 (1928). In the case of *McCampbell v. McCampbell* the District Court for the Western District of Kentucky remarked: "There are no exceptions to the rule that an infant lacks the power to renounce his allegiance to the United States." 13 F. Supp. 847, 849 (1936).

Although the Department had for some time held that a minor could expatriate himself by taking an oath of allegiance to a foreign state, the Solicitor for the Department ruled in November 1928 that in view of the fact that there were two or more Federal decisions holding to the contrary, the Department should follow the decisions in the matter of granting passports notwithstanding the fact that it could in the exercise of the discretion conferred on the Secretary of State in such matters decline to do so. (III Hackworth's Digest of International Law, 274.)

In 1939 the case of Andrew Oswald Hannula, an American citizen born in the United States who had been naturalized in the Soviet Union on his own petition at the

age of twenty, and who, with the approval of the Soviet Authorities, had renounced his Soviet citizenship shortly after attaining his majority, the Department held that he could not be considered to have expatriated himself, and approved his application for registration as an American citizen. (*Ibid.* 276; 130—Hannula, Andrew Oswald.)

Certain language of the Supreme Court in the Elg case appears to confirm the rulings of the courts cited above. In that case the court said: "To cause a loss of that citizenship in the absence of treaty or statute having that effect, there must be voluntary action and such action cannot be attributed to an infant whose removal to another country is beyond his control and *who during minority is incapable of a binding choice.*" (307 U. S. 325, 334.) (Italics added.)

Section 401(b) of the Nationality Act provides that "no national under eighteen years of age can expatriate himself under subsections (b) to (g) inclusive of section 401," that is, by taking an oath of allegiance, voting, performing military service, etc. However, the act is silent with respect to the question at what age a national may expatriate himself by naturalization abroad on his own application (section 401(a)). Since section 403 expressly provides that a person under eighteen cannot express himself under specified subsections, and since subsection (a) is not included, it might plausibly be argued that persons under eighteen *are* capable of expatriating themselves under the latter subsection. It seems obvious, however, that that was not the intent of the act.

In an explanation of the provision of section 403 that a national under the age of eighteen years could not expatriate himself under subsections (b) to (g), inclusive, of section 401, it was stated in the comments accompanying

the President's message submitting the legislation to Congress that the reasons for the provisions were "obvious," and that "it does not seem reasonable that an immature person should be able to expatriate himself by any act of his own." Reference was then made to several of the court decisions discussed above and the following was added:

"It will be observed that in this subsection the age below which a person cannot expatriate himself is set at 18 years, instead of 21 years. It is believed that a person who has reached the age of 18 years should be able to appreciate fully the seriousness of any act of expatriation on his part. Moreover, in the time of war young men are frequently accepted for military service before they have reached the age of 21 years, and, under the laws of some foreign countries males become liable for the performance of involuntary military service when they reach the age of 18 years." (Part I, p. 69.)

However, there appears to be nothing in the Reports of the Committees of Congress, or the report or minutes of the Committee of Advisers, which throws any light on the question why section 403, containing the age restriction, made no reference to subsection (a) of section 401 in relation to expatriation through naturalization. It seems probable that in considering the question of the expatriation of minors, the fact that a minor might be naturalized abroad on his own application was completely overlooked. In any event the net result appears to be that if, as the courts have held, it was the law of the United States that a person under the age of twenty-one years was incapable of expatriating himself, that law has been changed by the Nationality Act of 1940 to the extent that a person eighteen years of age may expatriate himself under sub-

sections (b) to (g) but not under subsection (a). To hold that the 1940 Act amended the existing law by reducing from twenty-one years to eighteen years the age at which a person might expatriate himself by naturalization would involve, in effect, an amendment, by construction, of section 403 by changing the language from "subsections (b) to (g)" to "subsections (a) to (g)." Obviously this is not permissible.

Consequently, it appears that we are confronted with a situation under the law in which a person nineteen years of age who goes through a formal naturalization process, probably involving a renunciation of American nationality, and resulting in the acquisition of a foreign nationality, does not lose his American nationality, and in which, on the other hand, he loses his American nationality if at the same age he merely makes a renunciation of American nationality before an American consul, which does not result in the acquisition of a foreign nationality.

It may be noted that under the provisions of the Nationality Act of 1940 an alien may declare his intention to become an American citizen upon reaching the age of eighteen (sec. 331), may file his petition two years after the date of his declaration (at the age of twenty) (sec. 332) and he may be naturalized at any time after thirty days from the date of his petition, that is, before reaching the age of twenty-one years (sec. 334c). See also *United States v. Stabile,* 24 Fed. (2d) 98, and cases there cited. It may also be noted that under existing law a person in the military or naval service may be naturalized "regardless of age" (8 U.S.C., Supp. III, 1001). Since boys are inducted in the service at the age of eighteen years, and may, under certain circumstances, enlist even

before reaching that age, and become naturalized, the supposed incapacity of a minor to act in naturalization on matters becomes ridiculous. In this same connection, and with reference to section 3 of the Act of March 2, 1907, which provides that "any American woman who marries a foreigner shall take the nationality of her husband," it was held in *In re Wittus,* 47 Fed. (2d) 652, that an American woman marrying a foreigner lost her American citizenship, irrespective of the fact that she was only nineteen at the time of marriage.

However, in view of the fact that no reference is made in section 403 to 401(a) there seems to be no jurisdiction for holding that the law of the United States, as pronounced by the courts, to the effect that a minor could not expatriate himself, has been changed in so far as naturalization abroad is concerned. It is believed well settled that inconsistencies and omissions in statutes must be remedied or supplied by legislative action rather than by judicial or administrative interpretations.

May 6, 1946.

MEMORANDUM.**

Nationality Status of Ismael Acosta-Hernandez.

The sole question involved is whether a citizen of the United States can lose his citizenship under Section 401(j) of the Nationality Act of 1940, as amended, prior to reaching his twenty-first birthday. The respective views of the Commissioner of Immigration and Naturalization and the

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**This memorandum was also prepared by the Legal Adviser to the Department of State. It was forwarded by letter of May 9, 1946, to the appellant, Clark, by the Acting Secretary of State. It illustrates that the State Department's views have consistently been *contra* to the appellants' and in accord with appellees'.

Board of Immigration Appeals are ably set forth in memorandum opinions, copies of which accompany the Attorney General's letter of January 8, 1946. In the present memorandum, the matter will be dealt with in the light of considerations and authorities which may not, thus far, have been taken into account.

Section 401 of the Nationality Act of 1940, as originally enacted, provided for the loss of nationality by an individual as a consequence of his performance of certain acts specified in subsections (a) to (h) inclusive. The section was amended by the Act approved July 1, 1944 (58 Stat. 667) by adding subsection (i). The section was further amended by the Act of September 27, 1944 (58 Stat. 746) by adding the following subsection (j):

"(j) Departing from or remaining outside of the jurisdiction of the United States in time of war or during a period declared by the President to be a period of national emergency for the purpose of evading or avoiding training and service in the land or naval forces of the United States."

It appears to be conceded that the individual here involved remained, during his minority, outside the United States on and after September 27, 1944, for the purposes proscribed by subsection (j). A construction of the subsection in such manner as to make it applicable to minors would, of course, be in derogation of the accepted common law principle in the United States that minors cannot expatriate themselves, a principle with which the Congress was presumably familiar. The Congress was presumably also aware of the fact that minors were subject to the provisions of the Selective Service and Training Act, as amended, and that they might, therefore, perform acts proscribed by subsection (j). However, as stated in the

memorandum opinion of the Board of Immigration Appeals, "It is axiomatic that statutes in derogation of the common law must be strictly construed." Moreover, the subsection must be construed in the light of Section 403(b) of the Act, which provides:

"No national under eighteen years of age can expatriate himself under subsections (b) to (g), inclusive, of section 401."

In Sutherland, *Statutory Construction* (3rd ed.) Vol. 1, pp. 431-432, the following statements are made with reference to "amendatory acts":

"The General rule of statutory interpretation that a provision in an act is to be read in its context, or as the same principle is expressed with reference to whole statutes, if an amendment is regarded as a separate act rather than part of an existing act, a statute is to be read in connection with other statutes pertaining to the same subject matter, is applicable to the interpretation of amendatory acts. *The original section as amended and the unaltered sections of the act, code, or compilation of which it is a part, relating to the same subject matter, are to be read together.* The act or code as amended should be construed as to future events as if it had been *originally* enacted in that form. Provisions in the *unamended* sections applicable to the original section to which it was applicable are applicable to the section as amended in so far as they are consistent." (Italics supplied.)

In Black, Interpretation of Laws (2d ed.) p. 576, it is stated that:

"An Amendment of a statute by a subsequent act operates precisely as if the subject-matter of the amendment had been incorporated in the prior act at the time of its

adoption, so far as regards any action had after the amendment is made. For it must be remembered that an amendment becomes a part of the original act, whether it be a change of a word, figure, line, or entire section, or a recasting of the whole language. For example, the act of Congress 'to correct errors and supply omissions in the Revised Statutes' amends the Revised Statutes by adding to them certain provisions of existing statutes; but the amendments are not in the nature of new enactments; they are to be construed as though the Revised Statutes were originally adopted with these alterations incorporated therein. And where an amendatory act uses the language 'under the limitations herein provided,' this must be taken to refer to the limitations in the original act as it stands after all the amendments made thereto are introduced into their proper places therein."

With reference to the fact that Congress amended Section 401 but did not expressly amend Section 403 of the same act, attention is invited to *Bennett v. Greenwalt* (286 N. W. 722) in which the Supreme Court of Iowa stated:

". . . Where an amending act plainly states that it amends a specified section or part of an existing statute, it cannot be judicially construed as amending an unmentioned section. This rule is stated in 59 Corpus Juris, Section 647, page 1097, as follows: 'An act to amend a particular section in a general law is limited in its scope to the subject matter proposed to be amended. So where a statute purports to amend a designated clause of an existing statute, it will be presumed that such clause is the only one to which the legislature intended the amendment to apply.' The New Hampshire Court in Healey v. Wheeler, 75 N. H. 214, 72 A. 753, held that where a statute purports to amend a designated clause of another statute,

there is a presumption that it is the only clause to which the legislature intended it should apply. In his work on Constitutional Limitations, 5th Ed., 179, Cooley states: 'The courts cannot enlarge the scope of the title: they are vested with no dispensing power. The constitution has made the title the conclusive index of the legislative intent as to what shall have operation. It is no answer to say that the title might have been made more comprehensive, if in fact, the Legislature has not seen fit to make it so."

See also to the same effect *Healey v. Wheeler* (72 Atl. 753).

Whatever may have been the thought of those who originated subsection (j) with respect to the application of the subsection to minors, the fact is that in fitting the provision within the framework of the Nationality Act of 1940, the Congress appears to have completely overlooked Section 403(b) of that Act. In any event, the latter provision was not expressly amended, and, in view of the above-cited authorities, it is not believed that there is justification for construing the subsection as amending the common law rule concerning the expatriation of minors. It is believed to be well settled that omissions and deficiencies in statutes must be supplied or remedied by legislative action rather than by administrative interpretations.